

IN THE SUPREME COURT OF THE STATE OF IDAHO

REBECCA PARKINSON,

Plaintiff-Appellant,

vs.

JAMES BEVIS,

Defendant-Respondent.

Supreme Court Case No. 46269

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE JONATHAN MEDEMA

KIM J. TROUT

ATTORNEY FOR APPELLANT

BOISE, IDAHO

KEELY E. DUKE

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

# CASE SUMMARY

## CASE No. CV01-17-08744

**Rebecca Parkinson**  
**Plaintiff,**  
 vs.  
**James Bevis**  
**Defendant.**

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Location: **Ada County District Court**  
 Judicial Officer: **Medema, Jonathan**  
 Filed on: **05/10/2017**  
 Case Number History:  
 Appellate Case Number: **46269-2018**

### CASE INFORMATION

Case Type: **AA- All Initial District Court Filings (Not E, F, and H1)**

Case Status: **08/15/2018 Appealed Case - Supreme Court Appeal**

### DATE

### CASE ASSIGNMENT

#### Current Case Assignment

Case Number CV01-17-08744  
 Court Ada County District Court  
 Date Assigned 12/20/2017  
 Judicial Officer Medema, Jonathan

### PARTY INFORMATION

**Plaintiff** **Parkinson, Rebecca**

#### Lead Attorneys

**Trout, Kim Jay**  
*Retained*  
 208-577-5755(W)

**Defendant** **Bevis, James E.**

**Duke, Keely Elizabeth**  
*Retained*  
 208-342-3310(W)

### DATE

### EVENTS & ORDERS OF THE COURT

### INDEX

05/10/2017	Initiating Document - District	
05/10/2017	 Complaint Filed	
05/10/2017	 Summons Issued and Filed	
05/10/2017	<b>Summons</b> Bevis, James E. Served: 11/10/2017	
11/17/2017	 Motion to Disqualify <i>Judge Richard Greenwood Without Cause</i>	
11/17/2017	 Civil Case Information Sheet	
12/01/2017	 Motion to Dismiss	
12/01/2017	 Memorandum In Support of Motion to Dismiss	

**CASE SUMMARY**  
**CASE No. CV01-17-08744**







12/13/2017	 Order <i>Re: Motion to Disqualify</i>
12/14/2017	 Affidavit of Service <i>11/10/17</i>
12/20/2017	 Order for Disqualification of Judge <i>Disqualifying Judge Richard Greenwood without Cause</i>
12/20/2017	 Notice <i>of Reassignment to Judge Medema</i>
01/16/2018	 Notice of Hearing <i>on Motion to Dismiss 2/6/18 @ 3:00pm</i>
01/30/2018	 Response <i>to Defendant James A. Bevis's Motion to Dismiss</i>
01/30/2018	 Declaration <i>of Kim J. Trout</i>
02/02/2018	 Reply <i>Memorandum in Support of Defendant James A. Bevis' Motion to Dismiss Pursuant to IRCP 12(b)(6).</i>
02/06/2018	<b>Motion to Dismiss</b> (3:00 PM) (Judicial Officer: Medema, Jonathan) <i>Pursuant to IRCP 12(b)(6)</i>
02/06/2018	 Court Minutes
02/12/2018	 Motion <i>for Leave of Court to File Supplemental Memorandum</i>
02/14/2018	 Order <i>Denying Plaintiff's Motion for Leave of Court to File Supplemental Memorandum</i>
03/16/2018	 Decision or Opinion <i>Memorandum Decision and Order Granting Defendant's Motion to Dismiss</i>
03/23/2018	Judgment of Dismissal <i>With Prejudice</i>
03/23/2018	<b>Dismissed With Prejudice</b> (Judicial Officer: Medema, Jonathan) Party (Parkinson, Rebecca; Bevis, James E.)
03/23/2018	Civil Disposition Entered
04/06/2018	 Motion to Amend Complaint
04/06/2018	 Memorandum In Support of Motion <i>to Amend Complaint</i>
04/06/2018	

**CASE SUMMARY**  
**CASE No. CV01-17-08744**

	 Motion <i>to Reconsider</i>
04/06/2018	 Memorandum In Support of Motion <i>to Reconsider</i>
04/06/2018	 Declaration <i>in Support of Motion to Reconsider</i>
04/06/2018	 Motion <i>for Fees and Costs</i>
04/06/2018	 Memorandum In Support of Motion <i>Defendant's Verified Memorandum of Costs and Fees</i>
04/06/2018	 Declaration <i>of Keely E. Duke in Support of Defendant James A. Bevis's Motion for Fees and Costs</i>
04/20/2018	 Motion <i>Motion to Disallow Fees and Costs</i>
04/20/2018	 Memorandum In Support of Motion <i>to Disallow Fees and Costs</i>
04/20/2018	 Notice of Hearing <i>6/4/2018 @ 2:00 pm Motion to Disallow Fees and Costs</i>
04/24/2018	 Notice of Hearing <i>6/4/2018 @ 2:00 pm Notice of Hearing on Motion for Fees &amp; Costs</i>
05/24/2018	 Notice of Hearing <i>6/4/18 @ 2pm</i>
05/24/2018	 Motion <i>Motion to Shorten Time for Hearing</i>
05/25/2018	 Response <i>in Opposition to Motion to Disallow Costs and Fees</i>
05/29/2018	 Response <i>Defendant's Opposition to Plaintiff's Motion to Reconsider</i>
05/31/2018	 Reply <i>Reply in Support of Motion to Reconsider</i>
05/31/2018	 Reply <i>Reply in Support of Motion to Disallow Fees</i>
06/04/2018	<b>Motion Hearing - Civil (2:00 PM)</b> (Judicial Officer: Medema, Jonathan) <i>Disallow Attorneys Fees and Costs</i>
06/04/2018	 Court Minutes



ADA COUNTY DISTRICT COURT  
**CASE SUMMARY**  
CASE No. CV01-17-08744

07/05/2018	 Order <i>Denying Motion to Reconsider</i>
07/05/2018	 Order <i>Denying Motion to Amend Complaint</i>
07/05/2018	 Order <i>Awarding Costs</i>
07/05/2018	 Amended Judgment
08/15/2018	 Notice of Appeal
08/15/2018	Appeal Filed in Supreme Court
10/05/2018	 Reporter's Notice of Transcript(s) Lodged <i>x 2 - Supreme Court No. 46269</i>

DATE	FINANCIAL INFORMATION	
	<b>Defendant</b> Bevis, James E.	
	Total Charges	136.00
	Total Payments and Credits	136.00
	<b>Balance Due as of 10/5/2018</b>	<b>0.00</b>
	<b>Plaintiff</b> Parkinson, Rebecca	
	Total Charges	450.00
	Total Payments and Credits	450.00
	<b>Balance Due as of 10/5/2018</b>	<b>0.00</b>

**KIM J. TROUT, ISB #2468**  
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Attorney for the Plaintiff.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

REBECCA PARKINSON,  
  
Plaintiff,  
  
vs.  
  
JAMES E. BEVIS,  
  
Defendant.

**COMPLAINT**

Case No. CV01-17-08744

**Filing Fee: \$221.00**

Comes now Rebecca Parkinson, Plaintiff herein, who as and for a cause of action  
pleads and alleges as follows:

**FACTS APPLICABLE TO ALL COUNTS**

1. Plaintiff, Rebecca Parkinson (Parkinson), is a divorced woman, residing in Ada County, Idaho.
2. Defendant James A. Bevis (Bevis), is an attorney, with his principal place of business in Ada County, Idaho, and who resides in Ada County, Idaho.
3. In July of 2014, Parkinson hired Bevis to represent her as an attorney in divorce proceedings with her now former husband, Joe Parkinson.
4. During the course of Bevis' representation of Parkinson, Bevis, without Parkinson's knowledge or consent, shared attorney-client confidential information with Joe Parkinson's attorney, Stanley Welsh.

5. During the course of the Bevis representation of Parkinson, on information and belief, Bevis was complicit with Welsh in securing a divorce for Joe Parkinson on terms more favorable to Joe Parkinson than with his client Rebecca Parkinson.

6. During the course of the Bevis representation, Bevis failed to fully and adequately represent Parkinson, including but not limited to, a full and complete evaluation of the true value of the community real property held by the Parkinson community.

### **COUNT I – BREACH OF FIDUCIARY DUTY**

7. Plaintiff hereby incorporates all preceding paragraphs herein as though fully set forth.

8. Bevis, as Parkinson's attorney, was subject to ethical and fiduciary duties to Parkinson during his representation of her in the divorce proceedings.

9. Upon information and belief, Bevis breached his duties to Parkinson by, among other things, disclosing attorney client privileged communications to Welsh during the course of the divorce proceedings, all to Parkinson's damage in an amount to be proven at time of trial.

### **ATTORNEY'S FEES**

Parkinson has been required to retain an attorney duly licensed in the State of Idaho to prosecute this action, and has agreed to pay said attorney a reasonable attorney's fee. The Court should award the sum of \$5,000.00 as a reasonable attorneys fee should this matter be resolved by default, and such additional and further sums as the Court deems reasonable should this matter be contested.

### **PRAYER FOR RELIEF**

1. That pursuant to Count One, Parkinson be awarded her damages as proven at time of trial;

2. That Parkinson be awarded her costs, and reasonable attorney fees in an amount not less than \$5,000 should this matter be resolved by a Default Judgment, and such other and further sums as the Court deems reasonable in the proceedings and necessarily incurred in this action; and

3. That Parkinson be awarded such other and further relief as the Court deems just.

DATED May 10, 2017.

TROUT LAW, PLLC

*Kim Trout*

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Kim J. Trout  
Attorney for Plaintiff

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Attorney for the Plaintiff.

Greenwood, Richard D.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

REBECCA PARKINSON,  
  
Plaintiff,

vs.

JAMES E. BEVIS,  
  
Defendant.

**SUMMONS**

Case No. CV01-17-08744

**TO: JAMES E. BEVIS, AND HIS ATTORNEYS OF RECORD**

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE NAMED PLAINTIFF. THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.**

1. You are hereby notified that in order to defend the lawsuit, an appropriate written response must be filed with the above designated court at 200 W. Front St., Boise, ID, within 20 days after service of this Summons on you. If you fail to so respond the Court may enter judgment against you as demanded by the Plaintiff in the Complaint.

2. A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation of an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

3. An appropriate written response requires compliance with Rule 10 and other Idaho Rules of Civil Procedure and shall also include:

- a. The title and number of this case.
- b. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
- c. Your signature, mailing address, and telephone number, or the signature, mailing address and telephone number of your attorney.
- d. Proof of mailing or delivery of a copy of your response to plaintiff's attorney as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

5/10/2017 3:09:44 PM CHRISTOPHER D. RICH  
CLERK OF THE COURT



*Christopher D. Rich*  
Deputy Clerk

Keely E. Duke  
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*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**MOTION TO DISQUALIFY  
JUDGE RICHARD GREENWOOD  
WITHOUT CAUSE**

Defendant by and through its undersigned counsel of record, Duke Scanlan & Hall, PLLC, hereby moves this Court for an order disqualifying the Honorable Richard Greenwood from presiding in further proceedings herein without cause pursuant to Rule 40(a) of the Idaho Rules of Civil Procedure.

DATED this 17<sup>th</sup> day of November, 2017.

DUKE SCANLAN & HALL, PLLC

By /s/ Keely E. Duke

Keely E. Duke – Of the Firm

Aubrey D. Lyon – Of the Firm

*Attorneys for Defendant James A. Bevis*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 17<sup>th</sup> day of November, 2017, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Kim J. Trout  
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*Attorneys for Plaintiff Rebecca Parkinson*

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/s/ Keely E. Duke

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Aubrey D. Lyon



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*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**DEFENDANT JAMES A. BEVIS'S  
MOTION TO DISMISS PURSUANT TO  
IRCP 12(b)(6)**

Defendant James A. Bevis (incorrectly identified as “James E. Bevis”), by and through his undersigned counsel of record, Duke Scanlan & Hall, PLLC, pursuant to Idaho Rules of Civil Procedure 12(b)(6), moves this Court to dismiss the Complaint filed by Plaintiff.

This motion is supported by the record before this Court and for the reasons set forth in the memorandum of points and authorities filed concurrently herewith.

**ORAL ARGUMENT IS REQUESTED.**

DATED this 1<sup>st</sup> day of December, 2017.

DUKE SCANLAN & HALL, PLLC

By /s/ Keely E. Duke

Keely E. Duke – Of the Firm

Aubrey D. Lyon – Of the Firm

*Attorneys for Defendant James A. Bevis*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 1<sup>st</sup> day of December, 2017, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

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/s/ Keely E. Duke

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*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
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REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**MEMORANDUM IN SUPPORT OF  
DEFENDANT JAMES A. BEVIS'S  
MOTION TO DISMISS PURSUANT TO  
IRCP 12(b)(6)**

Defendant James A. Bevis (incorrectly identified as "James E. Bevis"), by and through his undersigned counsel of record, hereby submits this memorandum in support of his Motion to Dismiss Pursuant to IRCP 12(b)(6). For the reasons stated herein, Mr. Bevis respectfully requests that the Motion be granted.

**INTRODUCTION**

Plaintiff Rebecca Parkinson alleges her former attorney, Defendant James A. Bevis, disclosed attorney-client communications and filed a claim against him. However, Mrs.

**MEMORANDUM IN SUPPORT OF DEFENDANT JAMES A. BEVIS'S MOTION TO DISMISS  
PURSUANT TO IRCP 12(b)(6) - 1**

Parkinson's cryptic Complaint fails to allege sufficient information to put Mr. Bevis on notice of the nature of her suit against him. Even if the Complaint does allege sufficient facts to support a cause of action, Mrs. Parkinson alleges the incorrect cause of action. For these reasons, her Complaint should be dismissed for failure to state a claim.

### **FACTUAL BACKGROUND**

This matter arises from a divorce wherein Mr. Bevis represented Mrs. Parkinson. Mrs. Parkinson's complaint against Mr. Bevis is skeletal. She alleges Stan Welsh represented Mr. Parkinson, and that Mr. Bevis shared confidential attorney-client information with Mr. Welsh without Mrs. Parkinson's consent. (Compl. ¶ 4.) She further alleges that Mr. Bevis was complicit with Mr. Welsh in securing a divorce that was more favorable to Mr. Parkinson than Mrs. Parkinson. (Compl. ¶ 5.) She further alleges that Mr. Bevis failed to obtain a full and complete evaluation of the marital property. (Compl. ¶ 6.)

Mrs. Parkinson alleges only one cause of action against Mr. Bevis, which is "breach of fiduciary duty." (See Compl.) Mrs. Parkinson only includes her allegation that Mr. Bevis disclosed privileged communications as a basis for her "breach of fiduciary duty" cause of action. (Compl. ¶ 8-9.) She alleges that Mr. Bevis's breach was "all to Parkinson's damage," without providing any allegations regarding how she was allegedly damaged. (Compl. ¶ 9.) Mrs. Parkinson waited two years to file her complaint against Mr. Bevis, then waited a full six months to serve the complaint.

### **LEGAL STANDARD**

A complaint which lacks allegations sufficient to state a claim for relief can be dismissed. I.R.C.P. 12(b)(6). "A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated." *Taylor v. McNichols*, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010).

“While we ‘will make every intendment to sustain a complaint that is defective, e.g., wrongly captioned or inartful, a complaint cannot be sustained if it fails to make a short and plain statement of a claim upon which relief may be granted.’” *Id.* at 843–44 (internal citations omitted). “We look at whether the complaint puts the adverse party on notice of the claims brought against it.” *Id.*

When a motion to dismiss for failure to state a claim is considered, “the non-moving party is entitled to have all inferences from the record viewed in his favor. After drawing all inferences in the non-moving party's favor, we then ask whether a claim for relief has been stated.” *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (internal citations and quotations omitted). In order to withstand a motion to dismiss, the nonmoving party must allege all essential elements of the claims presented. *Johnson v. Boundary School Dist. No. 101*, 138 Idaho 331, 334, 63 P.3d 457, 460 (2003).

## **ARGUMENT**

### **A. Mrs. Parkinson improperly styled her cause of action as “breach of fiduciary duty”**

“Malpractice by any other name still constitutes malpractice.” *Griggs v. Nash*, 116 Idaho 228, 232, 775 P.2d 120, 124 (1989). When an attorney breaches a fiduciary duty owed to a non-client, the non-client may have an action for breach of fiduciary duty. *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 125 Idaho 607, 614, 873 P.2d 861, 868 (1994). However, “[l]egal malpractice has traditionally been treated as the proper claim where an attorney breaches his or her duty, which arises from the attorney-client relationship.” *Bishop v. Owens*, 152 Idaho 616, 621, 272 P.3d 1247, 1252 (2012). An “action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of [the statute of limitations for malpractice], regardless of whether

predicated upon contract or tort or whether for indemnification or for direct damages.” *Griggs*, 116 Idaho at 232. “Under Idaho law, in determining which statute of limitations applies to a cause of action, courts must focus on the substance, rather than the form of a plaintiff’s allegations.” *Doe v. Boy Scouts of Am.*, 159 Idaho 103, 105, 356 P.3d 1049, 1051 (2015); *see also Bishop*, 152 Idaho at 621. “[T]he focus in Idaho is not on the remedy sought or the type of damages, but on the source of the damages.” *Id.* at 105 n.3.

In this case, Mrs. Parkinson attempts to characterize her cause of action as a claim for breach of fiduciary duty, even though the alleged conduct arose from the manner in which Mr. Bevis represented his client. As the Idaho Supreme Court held in *Bishop*, the law on this point is clear: legal malpractice is the proper claim where a client alleges the attorney breached his duty arising from the attorney-client relationship. Mrs. Parkinson’s allegations fail to state a claim for relief, as discussed below.

Even if they are sufficient to state a claim, the appropriate claim is for attorney malpractice, not breach of fiduciary duty. Mrs. Parkinson appears to make this curious designation of her cause of action to qualify for the four-year catchall statute of limitation provided in Idaho Code section 5-224 rather than the shorter, two-year limitation period provided in Idaho Code section 5-219(4). *See Jones*, 125 Idaho at 614. Idaho law is not meant to be so tortured. The Idaho Supreme Court instructed in *Boy Scouts*, *Bishop*, and other cases that the substance of a claim matters more than the form alleged. Because the substance of Mrs. Parkinson’s factual allegations are for attorney malpractice, but she is not pursuing that cause of action, she failed to allege a viable cause of action. *See Bishop*, 152 Idaho at 621 (dismissing improperly characterized cause of action for failure to state a claim). Mrs. Parkinson’s Complaint should be dismissed.

**B. Mrs. Parkinson failed to allege sufficient information upon which relief can be granted.**

1. *Mrs. Parkinson failed to allege a duty*

“The elements of a legal malpractice actions are: (a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been a proximate cause of the damages to the client.” *Taylor v. McNichols*, 149 Idaho 826, 845, 243 P.3d 642, 661 (2010). The disclosure of attorney-client communications is not a *per se* breach of fiduciary duty or malpractice because attorney-client communications that are intended to be delivered to a third party are not confidential and privileged. *See Farr v. Mischler*, 129 Idaho 201, 207, 923 P.2d 446, 452 (1996) (“To be a confidential communication the communication must ‘not be intended to be disclosed to third persons.’”).

Here, Mrs. Parkinson’s single cause of action lacks an allegation that Mr. Bevis had a duty to maintain all attorney-client communications as confidential or that he improperly disclosed privileged information that was not intended for disclosure. Mrs. Parkinson alleges that Mr. Bevis “was subject to ethical and fiduciary duties to Parkinson during his representation of her in the divorce proceedings.” (Compl. ¶ 8.) She then alleges only, “Upon information and belief, Bevis breached his duties to Parkinson by, among other things, disclosing attorney client privileged communications to Welsh during the course of the divorce proceedings, all to Parkinson’s damage in an amount to be proven at time of trial.” (Compl. ¶ 9.) Mrs. Parkinson does not identify the allegedly privileged communication that was disclosed or allege that she instructed Mr. Bevis to keep the communication private. She ignores that it is a frequent occurrence for a client to convey information to her attorney that she wants presented to the opposing side. An attorney does not commit malpractice by complying with the client’s wishes

and conveying the information, even if the information could be privileged had its disclosure not been intended. Absent an allegation that Mr. Bevis disclosed an attorney-client communication that was intended to be kept private, Mrs. Parkinson has failed to state a claim that a breach occurred.

2. *Mrs. Parkinson failed to allege causation and damages*

Two elements of an attorney malpractice cause of action are causation and damages. *Taylor*, 149 Idaho at 845. In *Spur Prod. Corp. v. Stoel Rives LLP*, 142 Idaho 41, 44, 122 P.3d 300, 303 (2005), a client brought an attorney malpractice action against its former attorney for allegedly improperly disclosing confidential attorney-client communications. The client alleged that, as a proximate result of the attorney misconduct, the client was deprived of its opportunity to enter into arbitration and thereby incurred damages. *Id.* In reviewing the case, the Idaho Supreme Court held that the causation allegation was sufficient to state a claim for relief. *Id.*

In contrast to *Spur Products*, in this case Mrs. Parkinson has not put Mr. Bevis on notice as to how she alleges Mr. Bevis caused her damage. In *Spur Products*, the client alleged that the attorney misconduct caused the client to miss an opportunity to enter arbitration, and that missed opportunity was damaging. Here, Mrs. Parkinson does not allege the nature of her damages. She does not allege she was monetarily damaged or otherwise make an allegation to show that she has a recoverable claim. All she alleges is that Mr. Bevis breached a duty “all to Parkinson’s damage in an amount to be proven at time of trial.” (Compl. ¶ 9.) She alleges Mr. Bevis’s breach was to disclose privileged information, but the disclosure of privileged information is not inherently damaging. This is not like a car accident where a plaintiff alleges she was hurt or a medical malpractice case where a patient alleges she was injured by an unnecessary surgery. Here, all Mrs. Parkinson alleges is that Mr. Bevis disclosed privileged information and that she



was damaged. That is not sufficient to put Mr. Bevis on notice as to what he is defending against.

3. *Mrs. Parkinson's cause of action relies upon an unsupported factual contention*

Factual contentions in a pleading must have “evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.” I.R.C.P. 11(b). While a pleading need not be supported by a complete factual investigation, Rule 11 requires “at least a reasonable inquiry into the facts of the case prior to filing a complaint.” *Riggins v. Smith*, 126 Idaho 1017, 1022, 895 P.2d 1210, 1215 (1995).

Here, Plaintiff cannot meet Idaho’s liberal pleading standard. The crux of Mrs. Parkinson’s single cause of action is the allegation that Mr. Bevis “breached his duties to Parkinson by, among other things, disclosing attorney client privileged communications to Welsh during the course of the divorce proceedings.” (Compl. ¶ 9.) However, this allegation is prefaced by the phrase, “Upon information and belief.” (Compl. ¶ 9.) That phrase, upon “information and belief,” is used only one other time in Mrs. Parkinson’s complaint. As used here, to qualify some allegations but not others, a reasonable inference is that Mrs. Parkinson intends the phrase as a caveat to provide some protection in case the Court later determines that she had no basis for the contention. It is a sign that Mrs. Parkinson does not know whether an attorney-client communication was improperly disclosed, which is insufficient factual support for a pleading. *See Delphix Corp. v. Actifo, Inc.*, No. C 13-4613 RS, 2014 WL 4628490, at \*1–2 (N.D. Cal. Mar. 19, 2014) (granting dismissal because allegations relied heavily upon were cabined with “on information and belief” and suggested undue speculation).

The fundamental purpose of notice pleading is to put the defendant on notice as to the claim that is being asserted against him. The contentions in a complaint must have some evidentiary support, and at least a reasonable inquiry into the facts is required before filing a complaint. Mrs. Parkinson's Complaint is so devoid of factual allegations regarding the basis of her claim that Mr. Bevis cannot divine what he is defending against. Furthermore, Mrs. Parkinson's unwillingness to make a firm allegation as to the fundamental facts of this action suggest this action is an improper fishing expedition of an unhappy former client who agreed to her settlement in writing in the presence of her attorney, Mr. Parkinson, and Mr. Parkinson's attorney.

### **CONCLUSION**

For the foregoing reasons, Defendant James A. Bevis respectfully requests that this Court grant his Motion to Dismiss because Mrs. Parkinson failed to state a claim.

DATED this 1<sup>st</sup> day of December, 2017.

DUKE SCANLAN & HALL, PLLC

By /s/ Keely E. Duke  
Keely E. Duke – Of the Firm  
Aubrey D. Lyon – Of the Firm  
*Attorneys for Defendant James A. Bevis*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 1<sup>st</sup> day of December, 2017, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

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/s/ Keely E. Duke  
Keely E. Duke  
Aubrey D. Lyon

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV-01-17-8744

ORDER RE: MOTION TO DISQUALIFY

I decline to grant the motion to disqualify without cause, but also will not deny it at this time. It is incumbent on the party making a motion to entitlement to the relief sought. A motion to disqualify without cause under I.R.C.P. 40(a) must be made “not later than 21 days after service or receipt of a complaint, summons, order or other pleading indicating or specifying who the presiding judge to the action will be.” Ordinarily the Court accepts the date of service of the complaint and summons as reflected in the proof of service as the controlling date, when the motion is not filed within 21 days after the issuance of the summons. In this case there is no proof of service and the summons was in May 2017, nearly seven months ago. There is nothing in the motion or otherwise of record that shows when Defendant was served or *otherwise received* notice of the assignment of the judge. I have an obligation under the Code of Judicial Conduct, Cannon 2, Rule 2.7, to serve in cases to which I am assigned unless disqualification is required. I take that duty seriously and know of no reason at present that would require my disqualification other than the pending motion.

I also recognize that the ability to disqualify a judge without cause is a procedure valued by both bench and bar and do not dismiss it lightly. For that reason, rather than deny the motion, I will give counsel the opportunity to file an affidavit or other document showing the date of receipt of “a complaint, summons, order or other pleading indicating or specifying who the presiding judge to the action will be.”

DATED: \_\_\_\_\_

Signed: 12/13/2017 04:39 PM

  
\_\_\_\_\_  
RICHARD D. GREENWOOD  
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of December, 2017, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Keely E. Duke  
Aubrey D. Lyon  
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CHRISTOPHER D. RICH  
Clerk of the District Court

Signed: 12/13/2017 04:51 PM

By *K. Platus*  
Deputy Clerk



**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

Rebecca Parkinson

Plaintiff(s):

**AFFIDAVIT OF SERVICE**

vs.

Case Number: CV01-17-08744

James A. Bevis

Defendant(s):

For:  
Trout Law, PLLC  
3778 Plantation River Dr., Ste. 101  
Boise, ID 83703

STATE OF IDAHO                     )  
  :ss  
COUNTY OF ADA                    )

Received by Tri-County Process Serving LLC on November 9, 2017 to be served on **JAMES A. BEVIS**.

I, Kasey L. Vink, who being duly sworn, depose and say that on Friday, November 10, 2017, at 10:36 AM,  
I:

**SERVED** the within named person(s) by delivering to and leaving with **JAMES A. BEVIS** a true copy of the  
**Summons and Complaint**. Said service was effected at **412 E. Parkcenter Blvd., Ste. 211, Boise, ID  
83706**.

I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over  
the age of Eighteen years and not a party to the action.

Our Reference Number: 163417  
Client Reference: Kim J. Trout

Subscribed and sworn before me today  
Friday, November 10, 2017

**TRI-COUNTY PROCESS SERVING LLC**

P.O. Box 1224  
Boise, ID, 83701  
(208) 344-4132



*Kasey Vink*  
\_\_\_\_\_  
*Shannon Roesberry*  
\_\_\_\_\_  
Notary Public for the State of Idaho  
Residing at Boise, Idaho  
My Commission Expires on November 20, 2018  
000027

FILED By: AJ Deputy Clerk  
 Fourth Judicial District, Ada County  
 CHRISTOPHER D. RICH, Clerk

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*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**ORDER GRANTING MOTION TO  
 DISQUALIFY JUDGE RICHARD  
 GREENWOOD WITHOUT CAUSE**

Based on Defendant's Motion to Disqualify Judge Richard Greenwood, he is disqualified without cause as the presiding judge in this matter, pursuant to Idaho Rule of Civil Procedure 40(a).

Signed: 12/19/2017 01:25 PM

DATED this \_\_\_\_\_ day of November, 2017.

  
 \_\_\_\_\_  
 Honorable Richard Greenwood  
 District Judge

**ORDER GRANTING MOTION TO DISQUALIFY JUDGE RICHARD GREENWOOD WITHOUT  
 CAUSE - 1**

000028



**CLERK'S CERTIFICATE OF SERVICE**

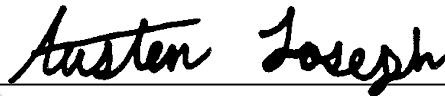
I HEREBY CERTIFY that on the 20th day of ~~November~~ <sup>December</sup>, 2017, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

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Clerk

Signed: 12/20/2017 01:28 PM

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Rebecca Parkinson  
Plaintiff,  
vs.  
James Bevis  
Defendant.

Case No. CV01-17-08744

**Notice of Reassignment**

NOTICE IS HEREBY GIVEN that the above-entitled case has been reassigned to the Honorable **Jonathan Medema**.

Dated: 12/20/2017

Christopher D. Rich  
Clerk of the District Court

By: *Austen Joseph*  
Deputy Clerk

**ANY OTHER HEARINGS CURRENTLY SET WILL HAVE TO BE RESET WITH THE NEWLY  
ASSIGNED JUDGE**

**CERTIFICATE OF SERVICE**

I certify that on this day I served a copy of the attached to:

Kim Jay Trout  
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Dated: 12/20/2017

By: *Austen Joseph*  
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*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**NOTICE OF HEARING**

PLEASE TAKE NOTICE, defendant James A. Bevis by and through his counsel of record, Duke Scanlan & Hall, PLLC, have set before this Court to be heard his Motion to Dismiss Pursuant to IRCP 12(b)(6). Said motion is set to be heard before the Honorable Jonathan Medema on the 6<sup>th</sup> day of February, 2018, at 3:00 pm at the Ada County Courthouse, Boise, Idaho.

DATED this 16<sup>th</sup> day of January, 2018.

DUKE SCANLAN & HALL, PLLC

By /s/ Keely E. Duke

Keely E. Duke – Of the Firm

Aubrey D. Lyon – Of the Firm

*Attorneys for Defendant James A. Bevis*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16<sup>th</sup> day of January, 2018, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

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Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**RESPONSE TO DEFENDANT  
JAMES A. BEVIS'S MOTION TO  
DISMISS**

I.R.C.P. 12

Plaintiff Rebecca Parkinson submits this Memorandum in Response to Defendant James A. Bevis's Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6).

**RESPONSE ARGUMENTS**

**1. Idaho's Liberal Standards for Pleadings and Rule 12(b)(6) Dismissals:**

Idaho follows a notice pleading standard: "Pleadings serve the purpose of stating the nature of the action brought so as to put the other party on notice, and to declare the relief sought. Unlike common law pleading and code pleading, perfection is not required; imperfections are not fatal. Pleadings serve to frame the issues so that an orderly trial can ensue, and a just resolution be pursued. Lawsuits are quests for the truth and justice; trials should no longer be waged in the pleading state." *Clark v. Olsen*, 110 Idaho 323, 328, 715 P.2d 993, 998 (1986) (concurring opinion).

Idaho also follows a liberal Rule 12(b)(6) dismissal standard: "A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only when it appears beyond doubt that the

plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief.” *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992) (citations omitted).

Bevis acknowledges these standards in his motion. (Memorandum in Support of Motion to Dismiss, pp. 2-3, citing *Taylor v. McNichols*, 149 Idaho 826, 843, 243 P.3d 642, 659 (2010)). However, Bevis then proceeds to wage a trial on the pleadings in his arguments. To do this, Bevis transmutes Parkinson’s only claim, *i.e.* breach of fiduciary duty, into something it is not, *i.e.* legal malpractice, and then attacks the illusory malpractice claim for its alleged deficiencies. (Memorandum in Support of Motion to Dismiss, pp. 3-4). This approach is a calculated abuse of the Idaho pleading and dismissal standards. As demonstrated herein, Parkinson states a valid a claim for breach of fiduciary duty. The Court, if necessary, must allow Parkinson the opportunity to amend her claim to repair any of its alleged deficiencies.

## **2. Parkinson Properly Characterizes her Breach of Fiduciary Duty Claim:**

Parkinson properly characterizes her claim as one of breach of fiduciary duty. “The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity. For a breach or violation of those professional duties, the client may hold the attorney liable or accountable.” *Blough v. Wellman*, 132 Idaho 424, 426, 974 P.2d 70, 72 (1999). This claim is distinct from a legal malpractice claim. Persuasive case law says:

“A breach of fiduciary duty claim has been described as ‘entirely different’ from a legal malpractice claim. One way in which these claims are different is the damages that a plaintiff can recover. A breach of fiduciary duty claim is an equitable claim for which a defendant can be required to disgorge all compensation received during the time it was breaching the fiduciary duty, even if the plaintiff cannot demonstrate a financial loss. *Wenzel v. Hopper & Galliher, P.C.*, 830 N.E.2d 996, 1001 (Ind. Ct. App. 2005); see also *Prime Mortg. USA, Inc. v. Nichols*, 885 N.E.2d 628, 659 (Ind. Ct. App. 2008) (‘we have previously held that one breaching a fiduciary duty may be required to disgorge all compensation received during the breach’). Conversely, ‘the measure of damages in a legal malpractice case is the value of the plaintiff’s lost claim.’ *Schultheis v. Franke*, 658 N.E.2d 932, 939-40 (Ind. Ct. App. 1995).

(*Hill Fulwider P.C. v. Swindell-Dressler Int’l Co., No. 1:15-cv-01554-JMS-TAB*, 2017 U.S. Dist. LEXIS 14472, at \*8 (S.D. Ind. Feb. 2, 2017) (emphasis added)).

Parkinson is not asking Bevis for the value of any lost divorce claims. Rather, Parkinson seeks relief from the breach of her attorney-client confidences. This point is clear from paragraphs ¶¶ 4, 7-9 of the Complaint. Parkinson's remedies of disgorgement and forfeiture of attorney fees are implicit in her breach of fiduciary duty claims. These remedies are also encompassed in her general prayer for "such other and further relief as the Court deems just." (Complaint, p. 3). Idaho case law confirms this point: "As a rule, in an equitable action, any relief may be granted consistent with the averments of the complaint, under a prayer for general relief." *Barker v. McKellar*, 50 Idaho 226, 236-37, 296 P. 196, 200 (1930).

### **3. Disgorgement and Forfeiture are Valid Remedies for Breach of Fiduciary Duty:**

In *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2001) ("Rockefeller I"), the Idaho Supreme Court explains that forfeiture of fees is an appropriate remedy against an agent who breaches his fiduciary duty to his principal. Before Rockefeller I, the Court had only sparsely developed its forfeiture doctrine. Not surprisingly, the Court in Rockefeller I relied on non-Idaho case law to further develop the doctrine. Citing to the Texas case *Burrow v. Acre*, the Rockefeller I Court lists several factors that should be considered in any Idaho forfeiture analysis. These factors include: the gravity and timing of the violation, its willfulness, its effect on the value of the agent's work for the principal, threatened or actual harm, and the adequacy of other remedies. (*Id.*, p. 642). The Court further explains that harm is not necessarily the controlling factor in a proper forfeiture analysis:

"Allowing an agent to retain his entire commission as a matter of law when he has breached his fiduciary duties would eviscerate agency law. Secure in his compensation from the principal as long as the assigned task is completed, an agent's only chance of loss from violating his duties would be if he harmed the principal. The higher requirement of acting in the interest of the principal, without a means of enforcement, would simply cease to exist."

(*Id.*, p. 642). Importantly, the Court's forfeiture framework (which it borrowed from the Texas case *Burrow v. Acre*) relies on the language in Section § 37 of the Restatement 3d of the Law Governing Lawyers, "Partial or Complete Forfeiture of a Lawyers Compensation." That section reads:

"A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies."

(*Id.*). Given that the Court adopted this language in *Rockefeller I*, it is important to detail some of the relevant comments and illustrations on forfeiture by the Restatement drafters:

- “The remedy of fee forfeiture presupposes that a lawyer’s clear and serious violation of a duty to a client destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer’s claim to compensation.”
- “The damage that misconduct causes is often difficult to assess. In addition, a tribunal often can determine a forfeiture sanction more easily than a right to compensating damages.”
- “A violation is clear if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful.”
- “To warrant fee forfeiture a lawyer’s violation must also be serious. Minor violations do not justify leaving the lawyer entirely unpaid for valuable services rendered to a client, although some such violations will reduce the size of the fee.”
- “Whether the breach involved knowing violation or conscious disloyalty to a client is also relevant.”
- “Conduct constituting malpractice is not always the same as conduct warranting fee forfeiture. A lawyer’s negligent legal research, for example, might constitute malpractice, but will not necessarily lead to fee forfeiture.”

(*Id.*). These comments establish that disgorgement and forfeiture are valid remedies for breach of a fiduciary duty. Parkinson is entitled to these remedies under her existing fiduciary claims.

#### **4. Bevis Breached his Duty of Confidentiality to Parkinson:**

Parkinson has evidence that Bevis shared her confidential client information with opposing counsel, Stan Welsh. (Complaint, ¶ 4). This fact is enough to put Bevis on notice of the nature of his particular breach. Idaho Rules. Prof’l Conduct 1.6 on confidential client information says: “A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted.” The official comments to this Rule further explains:

“A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation...this contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter... The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”

(*Id.*, Comments [2] and [3]). This is a comprehensive rule. It applies to all case-related client information, including any personal or embarrassing client information.



Bevis misconstrues this Rule by citing to *Farr v. Mischler*, 129 Idaho 201, 923 P.2d 446 (1996), in which the Court says: “To be a confidential communication the communication must ‘not be intended to be disclosed to third persons.’” (*Id.*, p. 207). But the Court in that case is referencing the attorney-client privilege rule under I.R.E. 502, which protects against a forced disclosure in a trial or discovery context. That narrow rule is different from Idaho Rules. Prof'l Conduct 1.6, which requires attorneys to keep all case-related information confidential as a matter of course, unless authorized or compelled otherwise. Bevis's notion that Parkinson must designate each communication to Bevis as “confidential,” at the risk of disclosure, is an ethical fabrication, not grounded in reality, and a substantial distortion of his duty.

As seen in Trout's supporting declaration, Bevis committed a clear and serious breach of Parkinson's confidences. In a May 17, 2015 email, Bevis says to Stan Welsh:

“This is all I have received from Becky around 2 PM yesterday. I told you about it yesterday. I sent emails to her about it and she has not responded. I will forward them to you. I will try to look at your exhibits today.”

(Declaration of Kim J. Trout in Support of Response to Defendant James A. Bevis's Motion to Dismiss, Exhibit A).<sup>1</sup> Bevis then proceeds to forward to Stan Welsh all of Parkinson's post-mediation emails about the settlement. (*Id.*, Exhibit A). In one particularly long and personal email, dated May 12, 2015, Parkinson vents her frustrations at Bevis—telling him that he failed to stand up to her at the mediation and that her husband got the better of her in the final settlement. (*Id.*). This was a personal, embarrassing communication which pertained to the value of Bevis's services. Bevis had no good reason to disclose it. In fact, Bevis's May 17, 2015, email only references the “yesterday” emails, meaning the emails dated May 16, 2015. By disclosing Parkinson's other private emails, Bevis left Parkinson with feelings of shame and inferiority as to how she fared in divorce. (*Id.*, Exhibit A).

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<sup>1</sup> In light of the declaration filed concurrently herewith, Parkinson asks the Court to rule on this motion under I.R.C.P. 56: “If matters outside the pleadings are presented to the court, the motion for judgment on the pleadings is converted into a summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure.” *Syringa Networks, Ltd. Liab. Co. v. Idaho Dep't of Admin.*, 159 Idaho 813, 824, 367 P.3d 208, 219 (2016). To the extent it does not consider the declaration, Parkinson asks the Court to consider Defendant's statements contained in Exhibit A as an admission of a party opponent, and evidence as providing a valid basis to amend her pleadings.

Admittedly, Bevis's breach did not affect the substance of Parkinson's divorce, as the parties had already settled at the time of his emails. Instead, the breach impaired the value of Bevis's services. Parkinson paid Bevis a substantial sum of money to stand by her and put forward her very best case. However, Bevis was blatantly and objectively disloyal to Parkinson, betraying her self-respect by willingly and intentionally giving over sensitive communications to her husband's attorney.

The fact that this did not 'harm' Parkinson's divorce case is immaterial. The Court in *Rockefeller v. Grabow*, 139 Idaho 538, 82 P.3d 450 (2003) ("Rockefeller II), says: "The weight to be given the various factors [in Rockefeller I] was within the discretion of the district court." (*Id.*, 544). The Court should consider the grievous nature of Bevis's betrayal, even though it did not cause any lasting financial damages. The Court should not allow Bevis to expose Parkinson's vulnerabilities just because the case is near over. The Court must apply the forfeiture principles in Rockefeller I to insure deterrence of this kind of disloyalty by Bevis, and others in the future:

"Allowing an agent to retain his entire commission as a matter of law when he has breached his fiduciary duties would eviscerate agency law. Secure in his compensation from the principal as long as the assigned task is completed, an agent's only chance of loss from violating his duties would be if he harmed the principal. The higher requirement of acting in the interest of the principal, without a means of enforcement, would simply cease to exist."

(*Rockefeller v. Grabow*, 136 Idaho 637, 642, 39 P.3d 577, 582 (2001) (emphasis added)).

#### **5. The Amount of Disgorgement or Forfeiture is a Triable Issue:**

The specific amount of Bevis's disgorgement or forfeiture is a triable issue. The Court cannot resolve the issue on the pleadings. Both Rockefeller I and Section § 37 of the Restatement 3d of the Law Governing Lawyers show that Bevis should not be able to keep all his fees. The Court must allow this issue to proceed to trial as to the amount of disgorgement or forfeiture.

Perhaps of greater significance, Bevis entirely fails to identify any (not a single one ) adverse facts to Parkinson's claims from the pleadings. "The questions at issue are fact-intensive and should not be resolved on a motion to dismiss where adverse dispositive facts are not evident on the face of the Complaint and are not otherwise admitted." *Waterfall Homeowners Ass'n v. Viega, Inc.*, 283 F.R.D. 571, 582 (D. Nev. 2012). Parkinson says in her Complaint that Bevis breached his duty of confidentiality. There is nothing in the record to contradict this statement, and so it must be assumed

as true under a Rule 12(b)(6) motion. “A motion to dismiss, unsupported by affidavits or depositions, does not controvert the facts alleged in the petition.” *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986) (citations omitted).

**6. Causation of Damages is Irrelevant to Parkinson’s Claim:**

Parkinson has not alleged a legal malpractice claim, and so causation of damages—in the normal sense—is irrelevant. Parkinson is not seeking ordinary damages. As explained above, Parkinson’s remedies of disgorgement and forfeiture are distinct from any legal malpractice damages, and the remedies do not require a specific nexus to damages. Parkinson’s harm is in the impaired value of Bevis’s legal services. Parkinson does not need to show any legal malpractice damages.

**7. Parkinson is Entitled to All Favorable Inferences:**

Parkinson is entitled to all favorable inferences from the complaint. “[The] standard for reviewing a Rule 12(b)(6) dismissal is the same as our summary judgment standard. The non-moving party is entitled to have all inferences from the record viewed in his favor and only then may the question be asked whether a claim for relief has been stated.” *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). The record now includes Trout’s declaration, and the favorable inferences to Parkinson are: (1) that Parkinson intended to file a breach of fiduciary claim, not a legal malpractice claim; (2) that Bevis breached his duties of confidentiality to Parkinson; (3) that Bevis’s breach impaired the value of his services to Parkinson; and (4) that Parkinson is entitled to a partial disgorgement or forfeiture of Bevis’s fees. These inferences, if proven at trial, entitle Parkinson to forfeiture relief. The Court must, therefore, deny the motion to dismiss.

**8. Parkinson is Entitled to Amend Her Complaint to Repair any Deficiencies:**

Finally, Parkinson is entitled to amend her pleadings to repair any alleged deficiencies. “[When] the complaint is capable of being amended to state facts sufficient to constitute a cause of action, a refusal to grant permission to amend would deprive appellant, a party to the action, of a substantial right.” *Markstaller v. Markstaller*, 326 P.2d 994, 997, 80 Idaho 129, 134-135 (1958). If Parkinson has failed to state a viable claim, the Court must give her sufficient time to amend the Complaint and fix any material deficiencies. Idaho case law explains:

“The purpose of [amended pleadings] is two-fold: First, to allow the best chance for each claim to be determined on its merits rather than on some procedural technicality; and, second, to relegate pleadings to the limited role of providing parties with notice of the nature of the pleader's claim and the facts that have been called into question...”

“...Issue formulation is to be left to the discovery process and pleadings are not to be viewed as carrying the burden of fact revelation or of controlling the trial phase of the action.”

(*Clark v. Olsen*, 110 Idaho 323, 326, 715 P.2d 993, 996 (1986)).

Importantly, Bevis did not have to file a Rule 12(b)(6) motion to dismiss. He had more appropriate options to address what he saw as a “cryptic” complaint. For instance, Bevis could have filed a Rule 12(e) motion for a more definite statement of the claims. “If upon reading the complaint the defendant is uncertain as to the nature of the claim of which he has been placed on notice, the proper remedy for seeking more particularity is by motion for a more definite statement at the pleading stage or by the rules of discovery thereafter.” *Andemeskel v. Waffle House*, 227 Ga. App. 887, 888, 490 S.E.2d 550, 551 (1997). Moreover, Bevis could have sent Parkinson’s counsel a letter, asking for clarification. By filing a Rule 12(b)(6) motion, Bevis clearly demonstrates he was uninterested in clarity but rather, sought to wage a trial on the pleadings—which is no longer acceptable procedure in Idaho. This type of bullying procedural assault is consistent with his demonstrated nature in communication, and certainly his conduct in representation of Parkinson. “Our liberal notice pleading standard is intended to see justice done, and prevent the dismissal of a valid claim for a mere technical failing.” *Brown v. City of Pocatello*, 148 Idaho 802, 809, 229 P.3d 1164, 1171 (2010).

### **CONCLUSION**

The Court should deny Bevis’s Rule 12(b)(6) motion in its entirety, as he fails to show that the breach of fiduciary claim is invalid. To the extent Parkinson’s claim is deficient, the Court should allow her the chance to amend it and to try it on its full merits.

DATED January 30, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 30, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

Keely E. Duke  
[ked@dukescanlan.com](mailto:ked@dukescanlan.com)

iCourt



Aubrey D. Lyon  
[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

/s/ Kim J. Trout  
Kim J. Trout

KIM J. TROUT, ISB #2468  
TROUT LAW, PLLC  
3778 N. Plantation River Dr., Ste. 101  
Boise, ID 83703  
Telephone (208) 577-5755  
Facsimile (208) 577-5756  
ktrout@trout-law.com

Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,  
  
Plaintiff,

vs.

JAMES E. BEVIS,  
  
Defendant.

Case No. CV01-17-08744

**DECLARATION OF KIM J. TROUT**

I.R.C.P. 12

Pursuant to Idaho Code § 9-1406 and I.R.C.P. 2.7, I declare the following is true and correct and submit the following declaration:

1. I am the Plaintiff and have personal knowledge of the facts stated herein.
2. Attached hereto as Exhibit A is a true and correct copy of correspondence from Mr. Bevis to Ms. Parkinson, including relevant attachments.

I declare under the penalty of perjury and pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED January 30, 2018.

/s/ Kim J. Trout  
Rebecca Parkinson

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 30, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

Keely E. Duke  
[ked@dukescanlan.com](mailto:ked@dukescanlan.com)

iCourt



Aubrey D. Lyon  
[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

/s/ Kim J. Trout  
Kim J. Trout

# EXHIBIT A



BEVIS, THIRY & SCHINDELE, P.A.

ATTORNEYS AT LAW

JAMES A. BEVIS  
KRISTA D. THIRY  
JENNIFER M. SCHINDELE  
PHILIP M. BEVIS

412 E. PARKCENTER, SUITE 211  
P.O. BOX 827  
BOISE, IDAHO 83701-0827  
TELEPHONE (208) 345-1040  
FAX (208) 345-0365

December 21, 2015

Becky Parkinson

Via Email  
[bjparkinson@att.net](mailto:bjparkinson@att.net)

Re: Rebecca Jean Parkinson v. Joe Parkinson  
BT&S File No. 9484.00

Dear Ms. Parkinson:

In view of your statement, "your billing is rejected", you leave me no other choice but to file suit against you.

Let me also respond to the unfounded speculation of Mr. Trout who wrote on August 18, 2015, "your failure to make production gives the impression you have something to conceal".

I have nothing to hide, but wasting more time in this office to furnish documents you already have is expensive, when you are not paying for the services rendered to date. The expense of providing documents pursuant to a valid production request will be added as attorney fees in the lawsuit to collect fees.

Nevertheless, I am providing the attached documents pertaining to emails from May 12-17, when you chose to agree a second time. You made demands in writing, and cut-off speaking to Peggy, Karen or me and failed to show for your appointment on May 13, 2015. As a result I sent you an email on May 14, 2015 (enclosed). The implication of complicity with Joe and his attorney is false.

I will wait to serve you after the holiday.

Signed,



James A. Bevis

JAB:kh

000045

## Jim Bevis

---

**From:** Jim Bevis  
**Sent:** Saturday, May 16, 2015 2:08 PM  
**To:** 'Buck Harris'  
**Subject:** FW: I am sick to my stomach

---

**From:** Jim Bevis  
**Sent:** Saturday, May 16, 2015 2:07 PM  
**To:** 'Becky J. Parkinson'  
**Subject:** RE: I am sick to my stomach

I received your email confirming that you accept the stipulation signed on May 11. It should also state that you will not change your mind. Please delete an attempt to negotiate the YMCA plan and cell phone plan because that is a counteroffer and rejection. The YMCA family plan currently costs \$144 one-time fee and dues of \$71 + tax. You can negotiate with Joe about the cell plan after the Judgment and Decree is entered. I will ask the Judge to enter the Decree Tuesday A.M. and he will likely ask to see the email, so please send me immediately another email with the wording I need. Welsh will probably be calling any minute so Time is of the essence now. Thank you . Jim Bevis

---

**From:** Becky J. Parkinson [mailto:bjparkinson@att.net]  
**Sent:** Tuesday, May 12, 2015 7:54 AM  
**To:** Jim Bevis; Karen Hall  
**Subject:** I am sick to my stomach

Jim,

I honestly cannot get past what happened yesterday. I was afraid to be in that room yesterday and I needed to to fight for me and NOT fight for Joe!! I don't even know the totality of what was agreed to yesterday because it was such a blur of activity and decisions were being made that I DID NOT AGREE TO, i.e. what portion of the attorney fees Joe would pay. I thought you and I had always agreed that he should pay all of the attorney fees!! It didn't even sink in until I got home that you had unilaterally agreed to \$26,500 and I don't even know where that figure came from. Honestly, I expect you to make this right today and to stop that document from being recorded. I need to understand the totality of this agreement I felt forced to have to sign.

I am not making this up. I was rushed into signing and I was not comfortable with it and I believe you know that. Someone needs to make be feel better about what transpired, because that was my life I was rushing into signing off on. Buck is the only one who took real time to listen to me. You might be tired of listening to me, but I paid you heftily to be on MY SIDE, and not on Joe's. The three of you were all coming from the same place yesterday and, as you know, I am not fully motivated by the money. I needed to know why you turned so quickly from telling me you "intended to win this", to suddenly thinking I had no choice by to sign yesterday. I DIDN'T KNOW I WAS GOING DOWN THERE TO SIGN OFF ON MY DIVORCE. I thought yesterday was just going to be the start of a discussion. Joe always pushes things like this and you let him push and win.

I process things and the more important those things are to me, the longer it takes me to feel comfortable. I don't know if I got the best deal I could get, but I know Joe feels he did. All I felt I was pressure to buy in. You know that. You know I was uncomfortable because I told you that. Why did you abandon me yesterday? I was against three aggressive men yesterday and I needed to take a

time out. I tried, but the longer I was there, the more I felt pressured to go along. Now, maybe I would have anyway, but we will never know. I just know that none of you wanted me to leave without signing and I felt completely alone in making that decision because you were also rushing me to make a decision. Honestly, what happened? Was it always going to play out this way? My birthday is Friday and I didn't want to be divorced ahead of my birthday. Not a big deal to you, but it is a big deal to me. I didn't know, as I said already, that I was walking into a situation yesterday, where I was going to feel pressured to sign anything. I have never been in this kind of situation and I was not prepared for what transpired.

This was my first and, hopefully, only divorce. I couldn't even grasp everything that was happening yesterday and I feel betrayed on every level. Who made the decision about the \$26,500 in attorney fees? I don't even know where that figure came from. All I know is that Joe got let off the hook yesterday and you seemed to help him. I didn't see any negotiating going on, except what I was negotiating and winning for myself. You didn't even ask him about the dumb cabinets. I got completely side-tracked on everything and no one had my back. I hate how I feel today. I felt just as badly last night. The way things played out yesterday was not right, and I am not even talking about the settlement part yet. I am so disappointed by how I was treated, on both levels. I had been having bad feelings about the meeting ahead of time, which I ignored. I thought you would fight harder for me.

I don't know what to do now. I don't know how I am going to ever feel better about the way this all played out. Ugh! I didn't deserve to feel as confused and pressured as I did yesterday. It was up to you to slow it all back down so that I felt I was making the best decision I could make...and I didn't need to make that yesterday on the spot. I need someone to help me come to terms with this. I hope you can keep the agreement from getting gfiled, given my reluctance to be forced in to it yesterday, which everyone ignored.

Becky

---

No virus found in this message.

Checked by AVG - [www.avg.com](http://www.avg.com)

Version: 2013.0.3495 / Virus Database: 4311/9765 - Release Date: 05/13/15

## Jim Bevis

---

**From:** Jim Bevis  
**Sent:** Sunday, May 17, 2015 8:30 AM  
**To:** 'Stanley W. Welsh'  
**Cc:** 'Buck Harris'  
**Subject:** FW: Settlement Agreement

Dear Stan: This is all I have received from Becky around 2 PM yesterday. I told you about it yesterday. I sent emails to her about it and she has not responded. I will forward them to you. I will try to look at your exhibits today

---

**From:** Buck Harris [mailto:buck@harriscpa.com]  
**Sent:** Saturday, May 16, 2015 1:55 PM  
**To:** Jim Bevis  
**Subject:** Fwd: Settlement Agreement

Buck

Buckner A. Harris  
BA Harris LLP  
960 Broadway St., Suite 314  
Boise, ID 83706

[www.harriscpa.com](http://www.harriscpa.com)

----- Original message -----

**From:** Becky Parkinson <bjparkinson@att.net>  
**Date:** 05/16/2015 12:53 PM (GMT-07:00)  
**To:** Buck Harris <buck@harriscpa.com>  
**Subject:** Fwd: Settlement Agreement

**From:** "Becky J. Parkinson" <bjparkinson@att.net>  
**Date:** t 16, 2015 at 8:53:43 AM MDT  
**To:** Becky Parkinson <bjparkinson@att.net>  
**Subject:** Settlementr Agreement  
**Reply-To:** "Becky J. Parkinson" <bjparkinson@att.net>

Buck,t

Per our conversation this morning, I am willing to move forward, under the same terms as Monday.

I ask only for Joe to give me until the end of the month to get my affairs in order as they relate to changing plans/policies/accounts into the correct names. I would further like to be able to negotiate on who carries the Y membership and the cell phone plan. I prefer to keep the family plan with AT&T, so that I do not lose my unlimited text and data plan with them. I will pay for the kids to remain on that plan with me, and Joe can sign up for his own plan, if AT&T allows me to carry the same plan (which Joe may need to

authorize). If Joe will show me this respect, and will show respect on other items that still need negotiation, then I will settle to get this over once and for all.

I would ask that whenever they file the new stipulation agreement, I would just prefer it be timed in such a way as that the final judgement does not fall until at least Tuesday (our 25th wedding anniversary). I wanted to make it to 25 years, for what ever reason. I think it is going to work that way anyway.

Buck, thank you for your understanding and for taking time to help me sort this all out.

Becky

---

No virus found in this message.

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Version: 2013.0.3495 / Virus Database: 4311/9792 - Release Date: 05/16/15

## Jim Bevis

---

**From:** Jim Bevis  
**Sent:** Sunday, May 17, 2015 8:43 AM  
**To:** 'Stanley W. Welsh'  
**Cc:** 'Buck Harris'  
**Subject:** RE: Parkinson

Gentlemen: I have not received an email from Becky this morning or last night. I'm at the office. 345-1048; cell 890-5019. I assume she got my emails .

---

**From:** Stanley W. Welsh [mailto:swelsh@CoshLaw.com]  
**Sent:** Saturday, May 16, 2015 10:55 AM  
**To:** Jim Bevis  
**Subject:** Re: Parkinson

Agreed

Stanley Welsh  
Cosh Humphrey,LLP  
208.344.7811

On May 16, 2015, at 10:53 AM, Jim Bevis <jbevis@bevislaw.com> wrote:

After it arrives, I suggest U & I go to court early AM Monday and appear to have it entered.

---

**From:** Stanley W. Welsh [mailto:swelsh@CoshLaw.com]  
**Sent:** Saturday, May 16, 2015 9:59 AM  
**To:** Buck Harris; Jim Bevis  
**Subject:** RE: Parkinson

Thanks

---

**From:** Buck Harris [mailto:buck@harriscpa.com]  
**Sent:** Saturday, May 16, 2015 8:35 AM  
**To:** Stanley W. Welsh; James Bevis  
**Subject:** Parkinson

Stan and Jim,

Haven't received the email from Becky. I did call and talk with her this morning. She has been busy with graduation activities last night and was preparing to head back to Caldwell this morning. She told me she would get the email sent this morning. I will forward it as soon as I get it.

Buck

Buckner A. Harris  
BA Harris LLP  
960 Broadway St., Suite 314  
Boise, ID. 83706

[www.harriscpa.com](http://www.harriscpa.com)

## Jim Bevis

---

**From:** Jim Bevis  
**Sent:** Sunday, May 17, 2015 10:32 AM  
**To:** 'Stanley W. Welsh'  
**Cc:** 'Buck Harris'  
**Subject:** RE: Parkinson

If she ever responds, I would note that the settlement did include, that Becky would receive Cole as a deduction for 2015 & 2016. It was omitted from the judgment.. Please call or email after your family time. JAB

---

**From:** Stanley W. Welsh [mailto:swelsh@CoshLaw.com]  
**Sent:** Saturday, May 16, 2015 10:55 AM  
**To:** Jim Bevis  
**Subject:** Re: Parkinson

Agreed

Stanley Welsh  
Cosh Humphrey,LLP  
208.344.7811

On May 16, 2015, at 10:53 AM, Jim Bevis <[jbevis@bevislaw.com](mailto:jbevis@bevislaw.com)> wrote:

After it arrives, I suggest U & I go to court early AM Monday and appear to have it entered.

---

**From:** Stanley W. Welsh [mailto:swelsh@CoshLaw.com]  
**Sent:** Saturday, May 16, 2015 9:59 AM  
**To:** Buck Harris; Jim Bevis  
**Subject:** RE: Parkinson

Thanks

---

**From:** Buck Harris [mailto:buck@harriscpa.com]  
**Sent:** Saturday, May 16, 2015 8:35 AM  
**To:** Stanley W. Welsh; James Bevis  
**Subject:** Parkinson

Stan and Jim,

Haven't received the email from Becky. I did call and talk with her this morning. She has been busy with graduation activities last night and was preparing to head back to Caldwell this morning. She told me she would get the email sent this morning. I will forward it as soon as I get it.

Buck

Buckner A. Harris  
BA Harris LLP  
960 Broadway St., Suite 314  
Boise, ID 83706

[www.harriscpa.com](http://www.harriscpa.com)

## Jim Bevis

---

**From:** Jim Bevis  
**Sent:** Sunday, May 17, 2015 11:58 AM  
**To:** 'Buck Harris'  
**Cc:** 'Becky J. Parkinson'  
**Subject:** RE: Settlement agreement

Dear Becky: Thank you for sending to me through Buck your confirmation. As you know Buck and Karen Hall and I endorse the settlement reached on May 11<sup>th</sup>. I emailed it to Welsh. I will go to court Monday with Welsh to advise the court to enter the Judgment and Decree Tuesday, and that you withdraw your motion to withdraw the stipulation. I will notify our witnesses Tim and Paul whose claims were honored 100% and thank them. I will notify Jake too. I will stop my trial preparation today once I hear from Stan. I know this process has been painful. We all tried to do our best for you because we cared. We hope you won't be a stranger as you are still welcome here. I remain, Very truly yours, James A. Bevis.

---

**From:** Buck Harris [mailto:buck@harriscpa.com]  
**Sent:** Sunday, May 17, 2015 11:31 AM  
**To:** Jim Bevis  
**Subject:** Fwd: Settlement agreement

Buck

Buckner A. Harris  
BA Harris LLP  
960 Broadway St., Suite 314  
Boise, ID. 83706

[www.harriscpa.com](http://www.harriscpa.com)

----- Original message -----

**From:** Becky Parkinson <bjparkinson@att.net>  
**Date:** 05/17/2015 11:28 AM (GMT-07:00)  
**To:** Buck Harris <buck@harriscpa.com>  
**Subject:** Settlement agreement

Dear Buck,

I am prepared to agree to the settlement agreement struck Monday, May 11, 2015. I will not change my mind.

Becky Parkinson  
Cell (208) 250-1848

---

No virus found in this message.

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Version: 2013.0.3495 / Virus Database: 4311/9795 - Release Date: 05/16/15



## Jim Bevis

---

**From:** Jim Bevis  
**Sent:** Sunday, May 17, 2015 11:39 AM  
**To:** 'Stanley W. Welsh'  
**Cc:** 'Becky J. Parkinson'  
**Subject:** FW: Settlement agreement

---

**From:** Buck Harris [mailto:buck@harriscpa.com]  
**Sent:** Sunday, May 17, 2015 11:31 AM  
**To:** Jim Bevis  
**Subject:** Fwd: Settlement agreement

Buck

Buckner A. Harris  
BA Harris LLP  
960 Broadway St., Suite 314  
Boise, ID. 83706

[www.harriscpa.com](http://www.harriscpa.com)

----- Original message -----

**From:** Becky Parkinson <bjparkinson@att.net>  
**Date:** 05/17/2015 11:28 AM (GMT-07:00)  
**To:** Buck Harris <buck@harriscpa.com>  
**Subject:** Settlement agreement

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Becky Parkinson  
Cell (208) 250-1848

---

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Version: 2013.0.3495 / Virus Database: 4311/9795 - Release Date: 05/16/15

## Jim Bevis

---

**From:** Jim Bevis  
**Sent:** Sunday, May 17, 2015 8:32 AM  
**To:** 'Stanley W. Welsh'  
**Subject:** FW:

---

**From:** Jim Bevis  
**Sent:** Saturday, May 16, 2015 2:34 PM  
**To:** 'Becky J. Parkinson'  
**Subject:**

Welsh is waiting. Please respond as I asked.

---

**From:** Becky J. Parkinson [mailto:bjparkinson@att.net]  
**Sent:** Tuesday, May 12, 2015 7:54 AM  
**To:** Jim Bevis; Karen Hall  
**Subject:** I am sick to my stomach

Jim,

I honestly cannot get past what happened yesterday. I was afraid to be in that room yesterday and I needed to to fight for me and NOT fight for Joe!! I don't even know the totality of what was agreed to yesterday because it was such a blur of activity and decisions were being made that I DID NOT AGREE TO, i.e. what portion of the attorney fees Joe would pay. I thought you and I had always agreed that he should pay all of the attorney fees!! It didn't even sink in until I got home that you had unilaterally agreed to \$26,500 and I don't even know where that figure came from. Honestly, I expect you to make this right today and to stop that document from being recorded. I need to understand the totality of this agreement I felt forced to have to sign.

I am not making this up. I was rushed into signing and I was not comfortable with it and I believe you know that. Someone needs to make be feel better about what transpired, because that was my life I was rushing into signing off on. Buck is the only one who took real time to listen to me. You might be tired of listening to me, but I paid you heftily to be on MY SIDE, and not on Joe's. The three of you were all coming from the same place yesterday and, as you know, I am not fully motivated by the money. I needed to know why you turned so quickly from telling me you "intended to win this", to suddenly thinking I had no choice by to sign yesterday. I DIDN'T KNOW I WAS GOING DOWN THERE TO SIGN OFF ON MY DIVORCE. I thought yesterday was just going to be the start of a discussion. Joe always pushes things like this and you let him push and win.

I process things and the more important those things are to me, the longer it takes me to feel comfortable. I don't know if I got the best deal I could get, but I know Joe feels he did. All I felt I was pressure to buy in. You know that. You know I was uncomfortable because I told you that. Why did you abandon me yesterday? I was against three aggressive men yesterday and I needed to take a time out. I tried, but the longer I was there, the more I felt pressured to go along. Now, maybe I would have anyway, but we will never know. I just know that none of you wanted me to leave without signing and I felt completely alone in making that decision because you were also rushing me to make a decision. Honestly, what happened? Was it always going to play out this way? My birthday is Friday and I didn't want to be divorced ahead of my birthday. Not a big deal to you, but it is a big

deal to me. I didn't know, as I said already, that I was walking into a situation yesterday, where I was going to feel pressured to sign anything. I have never been in this kind of situation and I was not prepared for what transpired.

This was my first and, hopefully, only divorce. I couldn't even grasp everything that was happening yesterday and I feel betrayed on every level. Who made the decision about the \$26,500 in attorney fees? I don't even know where that figure came from. All I know is that Joe got let off the hook yesterday and you seemed to help him. I didn't see any negotiating going on, except what I was negotiating and winning for myself. You didn't even ask him about the dumb cabinets. I got completely side-tracked on everything and no one had my back. I hate how I feel today. I felt just as badly last night. The way things played out yesterday was not right, and I am not even talking about the settlement part yet. I am so disappointed by how I was treated, on both levels. I had been having bad feelings about the meeting ahead of time, which I ignored. I thought you would fight harder for me.

I don't know what to do now. I don't know how I am going to ever feel better about the way this all played out. Ugh! I didn't deserve to feel as confused and pressured as I did yesterday. It was up to you to slow it all back down so that I felt I was making the best decision I could make...and I didn't need to make that yesterday on the spot. I need someone to help me come to terms with this. I hope you can keep the agreement from getting gfiled, given my reluctance to be forced in to it yesterday, which everyone ignored.

Becky

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## Jim Bevis

---

**From:** Jim Bevis  
**Sent:** Sunday, May 17, 2015 8:32 AM  
**To:** 'Stanley W. Welsh'  
**Subject:** FW:

---

**From:** Jim Bevis  
**Sent:** Saturday, May 16, 2015 2:26 PM  
**To:** 'Buck Harris'  
**Subject:** FW:

---

**From:** Jim Bevis  
**Sent:** Saturday, May 16, 2015 2:19 PM  
**To:** 'Becky J. Parkinson'  
**Subject:**

Your email cannot state that you want to negotiate about other issues as that is a rejection. Jim Bevis

---

**From:** Becky J. Parkinson [mailto:bjparkinson@att.net]  
**Sent:** Tuesday, May 12, 2015 7:54 AM  
**To:** Jim Bevis; Karen Hall  
**Subject:** I am sick to my stomach

Jim,

I honestly cannot get past what happened yesterday. I was afraid to be in that room yesterday and I needed to to fight for me and NOT fight for Joe!! I don't even know the totality of what was agreed to yesterday because it was such a blur of activity and decisions were being made that I DID NOT AGREE TO, i.e. what portion of the attorney fees Joe would pay. I thought you and I had always agreed that he should pay all of the attorney fees!! It didn't even sink in until I got home that you had unilaterally agreed to \$26,500 and I don't even know where that figure came from. Honestly, I expect you to make this right today and to stop that document from being recorded. I need to understand the totality of this agreement I felt forced to have to sign.

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I process things and the more important those things are to me, the longer it takes me to feel comfortable. I don't know if I got the best deal I could get, but I know Joe feels he did. All I felt I was

pressure to buy in. You know that. You know I was uncomfortable because I told you that. Why did you abandon me yesterday? I was against three aggressive men yesterday and I needed to take a time out. I tried, but the longer I was there, the more I felt pressured to go along. Now, maybe I would have anyway, but we will never know. I just know that none of you wanted me to leave without signing and I felt completely alone in making that decision because you were also rushing me to make a decision. Honestly, what happened? Was it always going to play out this way? My birthday is Friday and I didn't want to be divorced ahead of my birthday. Not a big deal to you, but it is a big deal to me. I didn't know, as I said already, that I was walking into a situation yesterday, where I was going to feel pressured to sign anything. I have never been in this kind of situation and I was not prepared for what transpired.

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I don't know what to do now. I don't know how I am going to ever feel better about the way this all played out. Ugh! I didn't deserve to feel as confused and pressured as I did yesterday. It was up to you to slow it all back down so that I felt I was making the best decision I could make...and I didn't need to make that yesterday on the spot. I need someone to help me come to terms with this. I hope you can keep the agreement from getting gfiled, given my reluctance to be forced in to it yesterday, which everyone ignored.

Becky

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## Jim Bevis

---

**From:** Jim Bevis  
**Sent:** Sunday, May 17, 2015 8:33 AM  
**To:** 'Stanley W. Welsh'  
**Subject:** FW: I am sick to my stomach

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**From:** Jim Bevis  
**Sent:** Saturday, May 16, 2015 2:08 PM  
**To:** 'Buck Harris'  
**Subject:** FW: I am sick to my stomach

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**From:** Jim Bevis  
**Sent:** Saturday, May 16, 2015 2:07 PM  
**To:** 'Becky J. Parkinson'  
**Subject:** RE: I am sick to my stomach

I received your email confirming that you accept the stipulation signed on May 11. It should also state that you will not change your mind. Please delete an attempt to negotiate the YMCA plan and cell phone plan because that is a counteroffer and rejection. The YMCA family plan currently costs \$144 one-time fee and dues of \$71 + tax. You can negotiate with Joe about the cell plan after the Judgment and Decree is entered. I will ask the Judge to enter the Decree Tuesday A.M. and he will likely ask to see the email, so please send me immediately another email with the wording I need. Welsh will probably be calling any minute so Time is of the essence now. Thank you . Jim Bevis

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**From:** Becky J. Parkinson [mailto:bjparkinson@att.net]  
**Sent:** Tuesday, May 12, 2015 7:54 AM  
**To:** Jim Bevis; Karen Hall  
**Subject:** I am sick to my stomach

Jim,

I honestly cannot get past what happened yesterday. I was afraid to be in that room yesterday and I needed to to fight for me and NOT fight for Joe!! I don't even know the totality of what was agreed to yesterday because it was such a blur of activity and decisions were being made that I DID NOT AGREE TO, i.e. what portion of the attorney fees Joe would pay. I thought you and I had always agreed that he should pay all of the attorney fees!! It didn't even sink in until I got home that you had unilaterally agreed to \$26,500 and I don't even know where that figure came from. Honestly, I expect you to make this right today and to stop that document from being recorded. I need to understand the totality of this agreement I felt forced to have to sign.

I am not making this up. I was rushed into signing and I was not comfortable with it and I believe you know that. Someone needs to make be feel better about what transpired, because that was my life I was rushing into signing off on. Buck is the only one who took real time to listen to me. You might be tired of listening to me, but I paid you heftily to be on MY SIDE, and not on Joe's. The three of you were all coming from the same place yesterday and, as you know, I am not fully motivated by the money. I needed to know why you turned so quickly from telling me you "intended to win this", to suddenly thinking I had no choice by to sign yesterday. I DIDN'T KNOW I WAS GOING DOWN



THERE TO SIGN OFF ON MY DIVORCE. I thought yesterday was just going to be the start of a discussion. Joe always pushes things like this and you let him push and win.

I process things and the more important those things are to me, the longer it takes me to feel comfortable. I don't know if I got the best deal I could get, but I know Joe feels he did. All I felt I was pressure to buy in. You know that. You know I was uncomfortable because I told you that. Why did you abandon me yesterday? I was against three aggressive men yesterday and I needed to take a time out. I tried, but the longer I was there, the more I felt pressured to go along. Now, maybe I would have anyway, but we will never know. I just know that none of you wanted me to leave without signing and I felt completely alone in making that decision because you were also rushing me to make a decision. Honestly, what happened? Was it always going to play out this way? My birthday is Friday and I didn't want to be divorced ahead of my birthday. Not a big deal to you, but it is a big deal to me. I didn't know, as I said already, that I was walking into a situation yesterday, where I was going to feel pressured to sign anything. I have never been in this kind of situation and I was not prepared for what transpired.

This was my first and, hopefully, only divorce. I couldn't even grasp everything that was happening yesterday and I feel betrayed on every level. Who made the decision about the \$26,500 in attorney fees? I don't even know where that figure came from. All I know is that Joe got let off the hook yesterday and you seemed to help him. I didn't see any negotiating going on, except what I was negotiating and winning for myself. You didn't even ask him about the dumb cabinets. I got completely side-tracked on everything and no one had my back. I hate how I feel today. I felt just as badly last night. The way things played out yesterday was not right, and I am not even talking about the settlement part yet. I am so disappointed by how I was treated, on both levels. I had was haven bad feelings about the meeting ahead of time, which I ignored. I thought you would fight harder for me.

I don't know what to do now. I don't know how I am going to ever feel better about the way this all played out. Ugh! I didn't deserve to feel as confused and pressured as I did yesterday. it was up to you to slow it all back down so that I felt I was making the best decision I could make...and I didn't need to make that yesterday on the spot. I need someone to help me come to terms with this. I hope you can keep the agreement from getting gfiled, given my reluctance to be forced in to it yesterday, which everyone ignored.

Becky

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Checked by AVG - [www.avg.com](http://www.avg.com)

Version: 2013.0.3495 / Virus Database: 4311/9765 - Release Date: 05/13/15

## Jim Bevis

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**From:** Jim Bevis  
**Sent:** Sunday, May 17, 2015 8:32 AM  
**To:** 'Stanley W. Welsh'  
**Subject:** FW:

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**From:** Jim Bevis  
**Sent:** Saturday, May 16, 2015 2:56 PM  
**To:** 'Becky J. Parkinson'  
**Subject:**

I have to take care of grandchild at 3. I will be leaving in 6 minutes. I've been here since 10:30 waiting on a proper response from you. I don't have email at home. JAB

---

**From:** Becky J. Parkinson [mailto:bjparkinson@att.net]  
**Sent:** Tuesday, May 12, 2015 7:54 AM  
**To:** Jim Bevis; Karen Hall  
**Subject:**

Jim,

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I don't know what to do now. I don't know how I am going to ever feel better about the way this all played out. Ugh! I didn't deserve to feel as confused and pressured as I did yesterday. It was up to you to slow it all back down so that I felt I was making the best decision I could make...and I didn't need to make that yesterday on the spot. I need someone to help me come to terms with this. I hope you can keep the agreement from getting gfiled, given my reluctance to be forced in to it yesterday, which everyone ignored.

Becky

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Version: 2013.0.3495 / Virus Database: 4311/9765 - Release Date: 05/13/15

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Telephone (208) 342-3310  
Facsimile (208) 342-3299

*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**REPLY IN SUPPORT OF DEFENDANT  
JAMES A. BEVIS'S MOTION TO  
DISMISS PURSUANT TO IRCP 12(b)(6)**

Defendant James A. Bevis (incorrectly identified as "James E. Bevis"), by and through his undersigned counsel of record, hereby submits this memorandum in further support of his Motion to Dismiss Pursuant to IRCP 12(b)(6). For the reasons stated herein, Mr. Bevis respectfully requests that the Motion be granted.

**INTRODUCTION**

Plaintiff Rebecca Parkinson's breach of fiduciary duty cause of action should be dismissed because her only cause of action against her former attorney for an alleged breach of a

**REPLY IN SUPPORT OF DEFENDANT JAMES A. BEVIS'S MOTION TO DISMISS PURSUANT TO  
IRCP 12(b)(6) - 1**

professional duty arising is legal malpractice. Mrs. Parkinson attempts to remedy her claim by alleging that she is seeking only the disgorgement of fees and therefore need not prove causation and damages, two elements of a legal malpractice cause of action. This argument is unavailing because Idaho does not allow a shortcut around proof of a legal malpractice claim. Reasonable inferences and a potential amended pleading also do not save Mrs. Parkinson's Complaint because, even when allowed all reasonable inferences, she cannot establish a claim for relief. Additionally, Mrs. Parkinson improperly offers evidence outside the pleadings in connection with this Motion to Dismiss.

With respect to the claim of legal malpractice, despite Plaintiff's counsel's response to the Motion to Dismiss, Mr. Bevis's Motion is not directed at inartful drafting of the Complaint. Rather, Mr. Bevis brings his Motion because Mrs. Parkinson alleges an improper cause of action and has failed to allege facts which, if proved, would constitute a claim for relief. It is well-established that the fundamental purpose of notice pleading is to put the defendant on notice as to the nature of the claims levied against him. In this case, Mrs. Parkinson's allegations are a moving target, and the brief in response to Mr. Bevis's Motion to Dismiss demonstrates that the Complaint fails to put Mr. Bevis on notice of what he is defending against.

### **ARGUMENT**

#### **A. Mrs. Parkinson ignores controlling Idaho authority regarding claims against an attorney arising from the provision of professional services.**

Mrs. Parkinson's only cause of action against her former attorney for an alleged breach of a professional duty arising from the representation is legal malpractice, not breach of fiduciary duty. The Court need not look outside Idaho to answer the question of whether a former client may maintain a cause of action for breach of fiduciary duty against her former attorney, (*see* Plf. Response to Mot. To Dismiss 3), because Idaho's own authority directly answers the question.

In considering whether a client may bring a claim against a former attorney for more than legal malpractice, the Idaho Supreme Court noted that “legal malpractice” is defined as “wrongful acts or omissions in the performance of professional services by any person ... licensed to perform such services under the law of the state of Idaho.” *Greenfield v. Smith*, 162 Idaho 246, 395 P.3d 1279, 1283 (2017) (citing Idaho Code § 5-219(4)). “Legal malpractice” is an amalgamation and encompasses claims beyond those sounding in tort. *See id.*

It is a long-established rule in Idaho that regardless of the label applied to claims by the plaintiff, a cause of action against a professional arising out of the provision of professional services to the plaintiff sounds in professional negligence. *Griggs v. Nash*, 116 Idaho 228, 232, 775 P.2d 120, 124 (1989); *Lapham v. Stewart*, 137 Idaho 582, 588, 51 P.3d 396, 402 (2002); *Bishop v. Owens*, 152 Idaho 616, 621, 272 P.3d 1247, 1252 (2012); *Greenfield v. Smith*, 162 Idaho 246, 395 P.3d 1279, 1284 (2017). In *Lapham*, the Idaho Supreme Court considered what claims could be asserted against an attorney in an action arising out of the provision of legal services to the plaintiff to determine the statute of limitations applicable to such claims. *Id.* at 585, 51 P.3d at 399. The case involved a mistake in disbursing funds to a debtor. The plaintiff argued that he was entitled to assert claims against the attorney for ordinary negligence, breach of contract, and breach of fiduciary duty, because they arose out of the provision of escrow services, which were separate and distinct from the legal services being provided by the attorney. *Id.* at 588-89, 51 P.3d at 402-03. The Idaho Supreme Court rejected this argument, noting that the focus of its inquiry would be whether the act or omission complained of arose out the performance of professional services, which it found that the disbursement of closing funds did. *Id.* at 589, 51 P.3d at 403. As such, the Idaho Supreme Court concluded that the only applicable

claim was professional negligence and the district court properly refused to allow amendment to assert claims for negligence, breach of contract, and breach of fiduciary duty. *See id.*

Based upon *Lapham*, the Idaho Supreme Court has gone on to find that even when the claim asserted arises out of an express contract for professional services, the only claim that can properly be asserted is professional negligence, not some other claim such as breach of contract. *See Nerco Minerals Co. v. Morrison Knudsen Corp.*, 140 Idaho 144, 149, 90 P.3d 894, 899 (2004).

Here, all of Mrs. Parkinson's claims arise out of Mr. Bevis's alleged wrongful acts in performing services in connection with his representation of her. While Mrs. Parkinson argues that this is really a breach of fiduciary duty action for the forfeiture of fees, she has not distinguished the factual basis of her claim from a claim for legal malpractice. Rather, Mrs. Parkinson's characterization of her claim appears to be an effort to remedy her inability to prove causation or damages. (*See* Plf.'s Response 3, 6, 7 (conceding that Mrs. Parkinson cannot prove damages and arguing proof of causation is irrelevant).) The fact that Mrs. Parkinson seeks to recover fees allegedly paid to Mr. Bevis does not, alone, separate it from a legal malpractice claim because the "focus in Idaho is not on the remedy sought or the type of damages, but on the source of the damages." *Doe v. Boy Scouts of Am.*, 159 Idaho 103, 105, 356 P.3d 1049, 1051 (2015). Because Mrs. Parkinson has not alleged the only cognizable cause of action against her attorney, Mrs. Parkinson has failed to state a claim.

Mrs. Parkinson contends that a claim for breach of fiduciary duty is distinct from a legal malpractice claim. (Plf.'s Response 2.) For this proposition, Mrs. Parkinson cites to *Blough v. Wellman*, 132 Idaho 424, 426, 974 P.2d 70, 72 (1999) and *Hill Fulwider P.C. v. Swindell-Dressler Int'l Co.*, No. 1:15-cv-01554-JMS-TAB, 2017 WL 447239, at \*3 (S.D. Ind. Feb. 2,

2017), an unreported decision from the U.S. District Court for the Southern District of Indiana. *Blough* is inapposite because it does not hold that a breach of fiduciary duty claim is separate and distinct from a legal malpractice claim. Even if it did so hold, the subsequent cases of *Lapham*, 137 Idaho at 588, *Bishop*, 152 Idaho at 621, and *Greenfield*, 395 P.3d at 1284 make clear that Idaho does not recognize a breach of fiduciary duty cause of action against one's own attorney. *Hill Fulwider* is also inapposite because it relies on a series of Indiana state court cases establishing two parallel causes of action for breach of fiduciary duty and legal malpractice, which contradict Idaho's unambiguous authority that it does not recognize a breach of fiduciary duty cause of action against one's own attorney. *Hill Fulwider*, 2017 WL 447239 at \*3 (the attorney-defendant failed to cite any Indiana precedent holding that a plaintiff cannot pursue both a legal malpractice claim and a breach of fiduciary duty claim). As such, based on Idaho law, Plaintiff's breach of fiduciary duty claim should be dismissed.

**B. Mrs. Parkinson concedes that she does not have a legal malpractice cause of action because she cannot prove damages.**

Idaho does not allow a breach of fiduciary duty cause of action in lieu of a legal malpractice cause of action. The "negligence of the lawyer must have been a proximate cause of the damages to the client." *Taylor v. McNichols*, 149 Idaho 826, 845, 243 P.3d 642, 661 (2010). Here, Mrs. Parkinson concedes that Mr. Bevis did not cause her damages. (Plf.'s Response 3.) Rather, she argues, she seeks only disgorgement and forfeiture of attorney fees from Mr. Bevis. (*Id.*) Mrs. Parkinson argues that, "The fact that this did not 'harm' Parkinson's divorce case is

immaterial.” (Plf.’s Response 6.)<sup>1</sup> She further argues, “The Court should consider the grievous nature of Bevis’s betrayal, even though it did not cause any lasting financial damages.” (*Id.*)

Mrs. Parkinson argues that she need not prove damages because her claim is for the forfeiture of fees. For this proposition, Mrs. Parkinson cites to *Rockefeller v. Graham*, 136 Idaho 637, 39 P.3d 577 (2001). *Rockefeller*, however, and the Idaho cases cited therein, relate only to real estate agents and their commissions. The *Rockefeller* court cited to the Texas case of *Burrows v. Arce*, 997 S.W.2d 229 (Tex. 1999), a case which did involve a claim against an attorney. However, the Idaho Supreme Court only cited for *Burrows* for a discussion of the theory of automatic full forfeiture, not to upset the settled law on legal malpractice claims. *Rockefeller*, 136 Idaho at 642. Mrs. Parkinson cites to no Idaho authority for the proposition that a client can sue her former attorney and obtain a recovery without establishing the elements of legal malpractice.

*Rockefeller* and the Idaho cases cited therein do not address the duties of attorneys or harmonize their rule with the longstanding rules regarding legal malpractice being the only appropriate cause of action against an attorney for wrongful acts or omissions in the performance of an attorney’s professional services. The Idaho Supreme Court discussed in *Bishop*, 152 Idaho at 620, that legal malpractice actions encompass claims for a breach of the attorney-client relationship. “Legal malpractice has traditionally been treated as the proper claim where an attorney breaches his or her duty, which arises from the attorney-client relationship.” *Id.* at 621.

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<sup>1</sup> Mrs. Parkinson’s concession that Mr. Bevis did not harm her divorce case contradicts allegations in her Complaint. (*See, e.g.*, ¶¶ 5, 6). Mr. Bevis will accept that the contradictory allegations in Mrs. Parkinson’s Complaint have been abandoned.

**C. Favorable inferences do not salvage Mrs. Parkinson's Complaint, and entitling Mrs. Parkinson to amend would be futile.**

Mrs. Parkinson argues she is entitled to favorable inferences in this matter. (Plf.'s Response 7.) She also argues that she should be entitled to amend her pleading to remedy any deficiencies. (*Id.*) When determining whether to allow an amendment, "the court may consider whether the new claims proposed to be inserted into the action by the amended complaint state a valid claim. If the amended pleading does not set out a valid claim, or if the opposing party would be prejudiced by the delay in adding the new claim, or if the opposing party has an available defense such as a statute of limitations, it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint." *Taylor*, 149 Idaho at 847.

Here, Mrs. Parkinson's claim should be dismissed because, even when she is given all reasonable inferences, she cannot establish an entitlement to relief. Mrs. Parkinson's only potential cause of action is for legal malpractice, and she acknowledges that she cannot prove all the elements of a legal malpractice claim. Mrs. Parkinson has not identified how she could amend her Complaint to assert a valid claim, and it appears from her representations in the Response Memorandum and the Complaint, that she cannot make allegations sufficient to state a claim for relief.

**D. Mrs. Parkinson improperly relies on materials outside the pleadings.**

In connection with her Response Memorandum, Ms. Parkinson offers various emails for the Court's consideration, which are improper in a motion to dismiss under Rule 12(b)(6). *See Taylor*, 149 Idaho at 833 ("The grounds for a Rule 12(b)(6) dismissal comprise only the pleadings and no more"). Mrs. Parkinson asks the Court to convert Mr. Bevis's motion from a Rule 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment. However, converting a motion to dismiss to a motion for summary judgment is only appropriate when the

**REPLY IN SUPPORT OF DEFENDANT JAMES A. BEVIS'S MOTION TO DISMISS PURSUANT TO IRCP 12(b)(6) - 7**



parties have been afforded a reasonable opportunity to present materials pertinent to a motion for summary judgment. *Taylor*, 149 Idaho at 833. Here, Mr. Bevis has not had an opportunity to prepare and present materials in support of a motion for summary judgment. Mr. Bevis further objects to the emails offered in counsel's declaration because they are not properly authenticated—counsel did not author and was not copied on the emails, and there is no additional information supporting his testimony that the emails are true and correct copies of correspondence among the parties.

### **CONCLUSION**

For the foregoing reasons, Defendant James A. Bevis respectfully requests that this Court grant his Motion to Dismiss because Mrs. Parkinson failed to state a claim.

DATED this 2<sup>nd</sup> day of February, 2018.

DUKE SCANLAN & HALL, PLLC

By /s/ Keely E. Duke  
Keely E. Duke – Of the Firm  
Aubrey D. Lyon – Of the Firm  
*Attorneys for Defendant James A. Bevis*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2<sup>nd</sup> day of February, 2018, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Kim J. Trout  
TROUT LAW, PLLC  
3778 N. Plantation River Drive, Suite 101  
Boise, ID 83703  
Telephone (208) 577-5755  
*Attorneys for Plaintiff Rebecca Parkinson*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Facsimile (208) 577-5756  
☒ iCourt/Email  
[kt trout@trout-law.com](mailto:kt trout@trout-law.com)

/s/ Keely E. Duke  
Keely E. Duke  
Aubrey D. Lyon

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Rebecca Parkinson  
Plaintiff,  
vs.  
James Bevis  
Defendant.

Case No. CV01-17-08744

COURT MINUTES

Event Code: CMIN

JUDGE: Jonathan Medema  
CLERK: Janet Ellis  
REPORTER: Sue Heronemus

DATE: 02/06/2018 TIME: 3:00 PM  
COURTROOM: 504

**APPEARANCES:**

Counsel for Plaintiff(s): Kim Jay Trout  
Counsel for Defendant(s): Keely Elizabeth Duke

<a href="#">03:26:40 PM</a>	Court	called REBECCA PARKINSON vs JAMES BEVIS CV01-17-8744, time set for Defendant's Motion to Dismiss
<a href="#">03:27:18 PM</a>	Kim Trout	counsel for plaintiff
<a href="#">03:27:24 PM</a>	Keeley Duke	counsel for defendant
<a href="#">03:27:31 PM</a>	Court	has viewed the pleadings filed in this matter
<a href="#">03:28:39 PM</a>	Ms. Duke	would request to be considered under a 12B-6 motion.
<a href="#">03:29:34 PM</a>	Court	facts submitted inquired if need time to refute
<a href="#">03:29:52 PM</a>	Ms. Duke	stated do not need extra time. Cont'd argument Request case be dismissed in its entirety.
<a href="#">03:36:00 PM</a>	Court	Greenfiled, Bishop, Griggs and Latham all stand for proposition, failure to provide add'l services. Agree with that proposition. Bishop and Greenfield suggest can sue attorney in contract. Parties can agree to heighten expectations.
<a href="#">03:37:21 PM</a>	Ms. Duke	overstatement of cases. Implied contract
<a href="#">03:40:09 PM</a>	Court	regarding Justice Horton's dissent in Bishop
<a href="#">03:40:24 PM</a>	Ms. Duke	duty that is owed

<a href="#">03:40:51 PM</a>	Court	hypothetical in a future 12 B-6 is that a malpractice
<a href="#">03:41:21 PM</a>	Ms. Duke	comments
<a href="#">03:42:14 PM</a>	Mr. Trout	argues breach of fiduciary claim.
<a href="#">04:00:10 PM</a>	Court	not a fair statement
<a href="#">04:00:16 PM</a>	Mr. Trout	Request court deny the Motion to dismiss
<a href="#">04:01:20 PM</a>	Ms. Duke	rebuttal argument - have to take it to a legal malpractice means - no exception here in Idaho, request Court follow the Supreme Court decision of Greenfield
<a href="#">04:06:53 PM</a>	Court	takes under advisement
<a href="#">04:07:06 PM</a>	End Case	

KIM J. TROUT, ISB #2468  
TROUT LAW, PLLC  
3778 N. Plantation River Dr., Ste. 101  
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ktrout@trout-law.com

Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,  
  
Plaintiff,

vs.

JAMES E. BEVIS,  
  
Defendant.

Case No. CV01-17-08744

**PLAINTIFF'S MOTION FOR  
LEAVE OF COURT TO FILE  
SUPPLEMENTAL MEMORANDUM**

Plaintiff Rebecca Parkinson respectfully moves the Court for the entry of an Order granting Plaintiff the right to file a Supplemental Memorandum in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss ("Supplemental Memorandum"), a copy of which is attached hereto, and for its reasons relies upon the following:

Plaintiff timely filed its Opposition to Defendant's Motion to Dismiss, however Defendant's Reply Memorandum and at the hearing on February 6, 2018, Defendant argued that there were substantive differences between a real estate agent and an attorney with respect to the doctrine of equitable forfeiture. Plaintiff has found relevant case law that addresses equitable forfeiture as it relates to attorneys. Given that Plaintiff did not have an opportunity to fully respond to this issue, Plaintiff requests an opportunity to do so.

Defendant would not be prejudiced by the filing of, and consideration of, this supplemental memorandum.

DATED February 9, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 9, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

Keely E. Duke  
[ked@dukescanlan.com](mailto:ked@dukescanlan.com)

iCourt



Aubrey D. Lyon  
[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

/s/ Kim J. Trout  
Kim J. Trout

# EXHIBIT A

KIM J. TROUT, ISB #2468  
TROUT LAW, PLLC  
3778 N. Plantation River Dr., Ste. 101  
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Telephone (208) 577-5755  
Facsimile (208) 577-5756  
ktrout@trout-law.com

Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,  
  
Plaintiff,

vs.

JAMES E. BEVIS,  
  
Defendant.

Case No. CV01-17-08744

**SUPPLEMENTAL  
MEMORANDUM**

Based upon questions presented and raised at oral argument on February 6, 2017, Plaintiff Rebecca Parkinson submits this Supplemental Memorandum in Response to Defendant James A. Bevis's Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6).

**SUPPLEMENTAL ARGUMENTS**

**1. Both Realtors and Attorneys Qualify as "Agents" under Idaho Agency Law:**

The Idaho Supreme Court describes agents generally: "An agent is a person who has been authorized to act on behalf of a principal towards the performance of a specific task or series of tasks." *Humphries v. Becker*, 159 Idaho 728, 735, 366 P.3d 1088, 1095 (2016). The Court describes realtors specifically: "A real estate broker is an agent standing in fiduciary relation to his principal." *Giese v. Tarp*, 92 Idaho 243, 244, 440 P.2d 521, 522 (1968). And the Court describes attorneys specifically: "The relationship between an attorney and client is one of agency in which the client is the principal and the attorney is the agent." *Caballero v. Wikse*, 140 Idaho 329, 332, 92 P.3d 1076, 1079 (2004). See also *Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 109, 218 P.3d 1150, 1170 (2009) ("It is generally



accepted that the relationship between an attorney and client is one of agency in which the client is the principal and the attorney is the agent.”); and, *Jaquith v. Stanger*, 79 Idaho 49, 53, 310 P.2d 805, 807 (1957) (“Where the relation of attorney and client exists, the client is bound, according to the ordinary rules of agency, by the acts of his attorney, within the scope of the latter's authority.”). Thus, there is no substantive distinction, with respect to principal/agent relations between realtors and attorneys.

With respect to equitable forfeiture, the Idaho Supreme Court, in *Rockefeller I*, relied on general agency law to delineate Idaho’s equitable forfeiture doctrine:

“As the Grabows' agent, Rockefeller was ‘a fiduciary with respect to matters within the scope of his agency.’ RESTATEMENT (SECOND) OF AGENCY § 13 (1958); see also *Mallory v. Watt*, 100 Idaho 119, 122, 594 P.2d 629, 632, (1979) (‘A real estate broker is an agent standing in a fiduciary relation to his principal.’); *Jordan v. Hunter*, 124 Idaho 899, 865 P.2d 990 (Ct.App.1993) (corporate officers are agents and subject to the fiduciary duties of agents).” It is the established law of this jurisdiction that an agent's right to compensation will be affected by a violation of his fiduciary duties. See, e.g., *Cooke v. Iverson*, 94 Idaho 929, 933, 500 P.2d 830, 835 (1972) (real estate agents lose their commissions for failure to disclose material facts); *Schroeder v. Rose*, 108 Idaho 707, 710, 701 P.2d 327, 330 (Ct.App.1985) (compliance with fiduciary duties is a condition precedent to collecting a commission); see also RESTATEMENT (SECOND) OF AGENCY §§ 456 and 469 (1958). Allowing an agent to retain his entire commission as a matter of law when he has breached his fiduciary duties would eviscerate agency law. Secure in his compensation from the principal as long as the assigned task is completed, an agent's only chance of loss from violating his duties would be if he harmed the principal. The higher requirement of acting in the interest of the principal, without a means of enforcement, would simply cease to exist.”

(*Rockefeller v. Grabow*, 136 Idaho 637, 642, 39 P.3d 577, 582 (2001)). Importantly, the Court in *Rockefeller I* used real estate agents and corporate officers as examples of agents—emphasizing the point that equitable forfeiture applies to all types of agents and that it is not industry specific. Here, the Court need not make any extensions of Idaho case law, but may simply apply the equitable forfeiture principles in *Rockefeller I* to Bevis as Parkinson’s attorney, i.e. as Parkinson’s agent.

## **2. Both Realtors and Attorneys are Subject to Equitable Forfeiture:**

Both realtors and attorneys are subject to equitable forfeiture for breach of their fiduciary duties. The Court in *Rockefeller I* applied this doctrine generally to all types of agents. The Court then articulated its equitable forfeiture standards using the near-verbatim language of Section § 37 of the Restatement 3d of the Law Governing Lawyers, “Partial or Complete Forfeiture of a Lawyers Compensation,” as seen in the following table:

A Comparison of Equitable Forfeiture Standards	
Rockefeller I Standards:	Section § 37 Restatement Standards:
<p>“In making its determination, the trial judge should consider factors including:</p> <ul style="list-style-type: none"> <li>(1) the seriousness and timing of the violation;</li> <li>(2) the willfulness of the breach;</li> <li>(3) the potential for, or actual harm to the principal;</li> <li>(4) and whether the agent completed a divisible portion of his contract duties before the breach occurred for which compensation can be determined.”</li> </ul>	<p>“Considerations relevant to the question of forfeiture include:</p> <ul style="list-style-type: none"> <li>(1) the gravity and timing of the violation;</li> <li>(2) <u>its</u> willfulness;</li> <li>(3) its effect on the value of the lawyer's work for the client;</li> <li>(4) any other threatened or actual harm to the client, and the adequacy of other remedies.”</li> </ul>

It would be logically and substantively inconsistent to recognize the *Rockefeller I* forfeiture standards but not apply them to attorney conduct—particularly when those standards were gleaned from a near identical forfeiture standard specifically written for attorneys. As demonstrated in Parkinson’s response brief, filed on 1/30/2018, the Court in *Rockefeller I* also cited to Texas case law which relied on Section § 37 standards. The fact that *Rockefeller I* involved realtors, not attorneys, is a matter of chance and is not legally significant. The Court should find that the *Rockefeller I* equitable forfeiture standards apply to Bevis’s conduct toward Parkinson and provide a legally sufficient basis for her breach of fiduciary duty claims.

### 3. Recognition of Equitable Forfeiture as A Cause of Action Against Attorneys:

As substantive authority, the Texas Supreme Court has said that the doctrine of equitable forfeiture applies broadly to attorneys and is not limited to cases with proof of actual damages:

“Texas courts of appeals, as well as courts in other jurisdictions and respected commentators, have also held that forfeiture is appropriate without regard to whether the breach of fiduciary duty resulted in damages. See, e.g., *Watson v. Limited Partners of WCKT, Ltd.*, 570 S.W.2d 179, 182 (Tex. Civ. App.--Austin, 1978, writ ref’d n.r.e.) (holding that limited partners may recover against general partner without a showing of actual damages); *Russell v. Truitt*, 554 S.W.2d 948, 952 (Tex. Civ. App.--Fort Worth 1977, writ ref’d n.r.e.) (holding that plaintiffs were entitled to recovery of agency fees as a matter of law if the breach of fiduciary duty was proved without regard as to whether the breach caused any harm); *Anderson v. Griffith*, 501 S.W.2d 695, 701 (Tex. Civ. App.--Fort Worth 1973, writ ref’d n.r.e.) (explaining that, even though the principal was not injured, ‘the self-interest of the agent is considered a vice which renders the transaction voidable at the election of the principal without looking into the matter further than to ascertain that the interest of the agent exists’) (quoting *Burleson v. Earnest*, 153 S.W.2d 869, 874 (Tex. Civ. App.--Amarillo 1941, writ ref’d w.o.m.)); see also *Judwin Properties, Inc. v. Griggs* &

*Harrison, P.C.*, 911 S.W.2d 498, 507 (Tex. App.--Houston [1st Dist.] 1995, no writ) (stating in dicta that ‘when an attorney has stolen or used the interest to the detriment of his client, the plaintiff need not prove causation for breach of fiduciary duty’); *Bryant v. Lewis*, 27 S.W.2d 604, 608 (Tex. Civ. App.--Austin 1930, writ dismissed) (holding that attorney who represented clients with conflicting interests was not entitled to any compensation for legal services rendered without addressing whether actual damages were sustained).”

(*Burrow v. Arce*, 997 S.W.2d 229, 239 n.35 (Tex. 1999)). See also, *Hendry v. Pelland*, 315 U.S. App. D.C. 297, 73 F.3d 397, 402 (1996) (“Under District of Columbia law, clients suing their attorney for breach of the fiduciary duty of loyalty and seeking disgorgement of legal fees as their sole remedy need prove only that their attorney breached that duty, not that the breach caused them injury.”).

Next, the Third Circuit Court of Appeals confirms that the Texas rule in *Burrow v. Arce* is consistent with the Restatement Second on Agency § 469, the same Restatement cited by the Idaho Supreme Court in *Rockefeller I*:

“Under Texas law, a client need not prove actual damages in order to obtain forfeiture of an attorney’s fee for the attorney’s breach of fiduciary duty to the client. *Burrow v. Arce*, 997 S.W.2d 229, 240, 42 Tex. Sup. Ct. J. 932 (Tex. 1999). See *Yaquinto v. Sergerstrom*, (*In re Segerstrom*, 247 F.3d 218, 226 n.5 (5th Cir. 2001). The Texas rule accords with the rule adopted in several other states, the Restatement (Second) of Trusts § 243, the Restatement (Second) of Agency § 469, and the Restatement (Third) of the Law Governing Lawyers, §§ 37, 55. It also comports with the two circuit level decisions on the issue, *Hendry v. Pelland*, 315 U.S. App. D.C. 297, 73 F.3d 397 (D.C. Cir. 1996) (applying D.C. law), *Frank v. Bloom*, 634 F.2d 1245, 1257-58 (10th Cir. 1980) (applying Kansas law).”

(*Huber v. Taylor*, 469 F.3d 67, 77 (3d Cir. 2006)).

Finally, the Ninth Circuit Court of Appeals explains that an attorney’s ethical violations are sufficient for the attorney to forfeit or disgorge his or her fees:

“In sum, under long-standing equitable principles, a district court has broad discretion to deny fees to an attorney who commits an ethical violation. In making such a ruling, the district court may consider the extent of the misconduct, including its gravity, timing, willfulness, and effect on the various services performed by the lawyer, and other threatened or actual harm to the client. See Restatement (Third) of Law Governing Lawyers § 37 (2000).”

(*Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012)). See also, *Eriks v. Denver*, 118 Wash. 2d 451, 462, 824 P.2d 1207, 1213 (1992) (“The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized.”); *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982) (“This court has repeatedly stated that an attorney (or any fiduciary) who breaches his duty to his client forfeits his right to compensation...the law has traditionally been unyielding in its assessment of

penalties when a fiduciary, or trustee, or agent has breached any of his obligations. The underlying policy is a strong one. It recognizes that insuring absolute fidelity to the principal's (or beneficiary's) interests is fundamental to establishing the trust necessary to the proper functioning of these relationships.”).

#### **4. The Court’s Forms-of-Action Analysis is Controlled by Parkinson’s Remedies:**

Bevis asserts in his reply brief, filed on 02/02/2018, that Parkinson’s claim is really a malpractice claims because “...Idaho does not recognize a breach of fiduciary duty cause of action against one’s own attorney.” (Reply in Support of Defendant James A. Bevis’s Motion to Dismiss Pursuant to IRCP 12(b)(6), p. 5). This statement is misleading as a matter of fact and law. Legal malpractice is traditionally a legal action, with legal remedies, while equitable forfeiture is an equitable action with equitable remedies. Of course, Parkinson knows that the Idaho State Constitution abolished forms of action in 1890. However, the Idaho Supreme Court noted soon afterward: “Abolition of the distinction between legal and equitable actions and the forms of legal actions does not abolish the distinction between remedies.” *Anderson v. War Eagle Consol. Mining Co.*, 8 Idaho 789, 807, 72 P. 671, 676 (1903).

Here, Parkinson simply seeks the equitable remedies of forfeiture and disgorgement. Parkinson has a clear legal right to seek these remedies under a breach of fiduciary duty action, not a legal malpractice action, as demonstrated above. Bevis’s position, if adopted, would force the Court to combine all of Parkinson’s potential claims and remedies under a single malpractice action. Bevis does not cite any authorities to support this result. In fact, one of Bevis’s alleged supporting authorities, *Bishop v. Owens*, contains a dissent by Justice Horton which explains that not all forms of action against an attorney (e.g., breach of contract) necessarily fit within a legal malpractice action. See *Bishop v. Owens*, 152 Idaho 617, 625, 272 P.3d 1247, 1256 (2012). As stated in the *Hendry v. Pelland* case, cited above, there is a fundamental rationale and purpose to these distinct remedies:

“The different treatment of compensatory damages and forfeiture of legal fees also makes sense. Compensatory damages make plaintiffs whole for the harms that they have suffered as a result of defendants’ actions. Clients therefore need to prove that their attorney’s breach caused them injury so that the trier of fact can determine whether they are entitled to any damages. Forfeiture of legal fees serves several different purposes. It deters attorney

misconduct, a goal worth furthering regardless of whether a particular client has been harmed. See *Gilchrist*, 387 N.W.2d at 416; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. b (Tentative Draft No. 4, 1991) (noting that forfeiture deters misconduct). It also fulfills a longstanding and fundamental principle of equity--that fiduciaries should not profit from their disloyalty. See, e.g., *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262, 268-69, 85 L. Ed. 820, 61 S. Ct. 493 (1941); RESTATEMENT (SECOND) OF AGENCY § 469 cmt. a (1958). And, like compensatory damages, it compensates clients for a harm they have suffered. See *Gilchrist*, 387 N.W.2d at 416; *Kidney Ass'n of Oregon, Inc.*, 843 P.2d at 447. Unlike other forms of compensatory damages, however, forfeiture reflects not the harms clients suffer from the tainted representation, but the decreased value of the representation itself.”

(*Hendry v. Pelland*, 315 U.S. App. D.C. 297, 73 F.3d 397, 402 (1996)).

Parkinson respectfully requests the Court reject Bevis’s arguments and allow Parkinson to proceed upon her stated claim. If Bevis is still confused as to the nature of the claim, or its remedies, he can move for a more definite statement instead of seeking a dismissal: “If upon reading the complaint the defendant is uncertain as to the nature of the claim of which he has been placed on notice, the proper remedy for seeking more particularity is by motion for a more definite statement at the pleading stage or by the rules of discovery thereafter.” *Andemeskel v. Waffle House*, 227 Ga. App. 887, 888, 490 S.E.2d 550, 551 (1997). In any event, the Court should allow Parkinson the chance to amend her pleadings, if necessary, prior to any Rule 12 dismissal.

DATED February 9, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 9, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

Keely E. Duke  
[ked@dukescanlan.com](mailto:ked@dukescanlan.com)

iCourt



Aubrey D. Lyon  
[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

/s/ Kim J. Trout  
Kim J. Trout

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

ORDER DENYING PLAINTIFF'S MOTION  
FOR LEAVE OF COURT TO FILE  
SUPPLEMENTAL MEMORANDUM

On December 1, 2017, the Defendant filed a motion to dismiss Plaintiff's complaint pursuant to I.R.C.P. 12(b)(6). Each party submitted briefing in accordance with the schedule set forth in I.R.C.P. 7(b)(3). After recusal of the previously assigned District Judge, this Court held a hearing on the motion on February 6, 2018. After hearing oral argument, this Court took the matter under advisement. Plaintiff now moves this Court for permission to file a supplemental memorandum because Plaintiff has found additional relevant case law that Plaintiff believes refutes arguments made by counsel for the Defendant at the hearing on this motion. That request is denied. The parties each had ample opportunity to provide briefing on the issues presented. If the Court believes it needs the parties to address an issue of law that was not previously addressed by the parties, the Court will order additional briefing.

Accordingly, Plaintiff's motion is denied. The Court will not consider the supplemental brief submitted along with Plaintiff's motion.

IT IS SO ORDERED.



Signed: 2/14/2018 02:54 PM

JONATHAN MEDEMA  
District Judge

CERTIFICATE OF MAILING

I hereby certify that on February 14, 2018, I served a true and correct copy of the within instrument as follows:

Kim J. Trout  
Trout Law, PLLC  
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( ) U.S. Mail, Postage Prepaid  
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Keely E. Duke  
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( ) Hand Delivered  
(X) Electronic Mail  
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CHRISTOPHER D. RICH  
Clerk of the District Court

Signed: 2/14/2018 02:56 PM

By: Janet Ellen  
Deputy Court Clerk





IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-8744

**MEMORANDUM DECISION  
AND ORDER GRANTING  
DEFENDANT'S MOTION TO DISMISS**

In 2015, Plaintiff Rebecca Parkinson was represented in her divorce proceedings by Defendant James Bevis, a licensed attorney. Before the Court for decision presently is Defendant's motion to dismiss Plaintiff's complaint pursuant to I.R.C.P. 12(b)(6). Defendant alleges Plaintiff has failed to sufficiently plead in her complaint a claim upon which this Court may grant her relief. Ms. Parkinson alleges in this action that Mr. Bevis breached his fiduciary duties to her during her divorce. Importantly for this motion, Ms. Parkinson has not alleged in her complaint that she suffered any economic damages as a result of Mr. Bevis' alleged breach of his fiduciary duties to her. Indeed, she has admitted at argument that she suffered no economic loss and she is not seeking compensatory damages. Instead, Ms. Parkinson asserts she is entitled to a remedy in equity. She is seeking to have this Court order Mr. Bevis to disgorge all or some of the fees Ms. Parkinson paid to him for the services he provided to her in the divorce action. For the reasons stated below, the Court grants Defendant's motion.

## **I. LEGAL STANDARDS APPLICABLE TO A MOTION PURSUANT TO I.R.C.P. 12(b)(6).**

Rule 12(b) of the Idaho Rules of Civil Procedure lists various defenses to a claim for relief that a party may assert by motion. One of those defenses is that the pleading by the adverse party simply fails to state a claim upon which relief may be granted. I.R.C.P. 12(b)(6). In deciding such motions, the Court's review is limited to the language of the pleading. The Court must draw all inferences from the facts stated in the pleading in favor of the non-moving party and determine whether a claim for relief has been alleged. *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989).

## **II. THE NATURE OF THE CLAIM PLAINTIFF HAS MADE AND THE PARTIES' ARGUMENTS.**

In her complaint, Plaintiff makes several, what she calls, factual allegations. The relevant ones are: that she and Mr. Bevis were in an attorney-client relationship; that during the course of representing her in the divorce, Mr. Bevis shared attorney-client confidential information with her husband's attorney; that Mr. Bevis "was complicit" with her husband's attorney in securing a divorce for her husband on terms more favorable to him than to her; and that Mr. Bevis failed to fully and adequately evaluate the true value of the marital community's real property. [Compl. ¶¶ 4-6].

However, despite this varied list of allegations, Plaintiff makes only one claim for relief in her complaint. She alleges Mr. Bevis "was subject to ethical and fiduciary duties" to her and that he "breached his duties to [her] by, among other things, disclosing attorney client privileged communications to Welsh during the course of the divorce proceedings, all to [her] damage in an amount to be proven at time of trial." [Compl. ¶¶ 8-9]. Plaintiff entitled her cause of action as a claim for breach of fiduciary duty.

Defendant moves to dismiss Plaintiff's complaint, arguing that it fails to state a claim upon which the Court may grant relief. Specifically, Defendant argues that Plaintiff has alleged a claim for legal malpractice. Defendant argues that the elements a plaintiff must prove in a claim for legal malpractice are: 1) the existence of an attorney-client relationship, 2) the existence of a duty on the part of the lawyer, 3) failure of the lawyer to perform the duty, and 4) the negligence of the lawyer must have been the proximate cause

of damage to the client. Defendant argues the complaint is deficient, in part, because Plaintiff has failed to allege the nature of her damages or the mechanism by which she believes Defendant's negligence was the proximate cause of those damages.

In response, Plaintiff concedes that she cannot show causation and damages to support a claim for professional malpractice. Plaintiff clarifies she does not intend to bring a claim at law for negligence. Rather, she is seeking equitable relief for what she alleges is Defendant's breach of his fiduciary duties to her. In her briefing, she states that she is seeking an order compelling Defendant to disgorge all or some of the fees she paid him for his professional services as a consequence for that alleged breach.

Defendant argues in response that the courts of Idaho do not permit a former client to bring a claim for breach of a fiduciary duty. Defendant argues that the Idaho Supreme Court has held that the only permissible cause of action a former client may bring against her former attorney for breach of the duties the attorney owes her because of that relationship is a claim for legal malpractice. Because Plaintiff concedes that she has not alleged and cannot prove such a claim, Defendant argues her complaint must be dismissed.

**A. THE DISTINCTION BETWEEN A CLAIM FOR PROFESSIONAL MALPRACTICE AND A CLAIM FOR BREACH OF FIDUCIARY DUTY.**

In Idaho a principal may bring an action in the courts seeking to compel the principal's agent to disgorge or to forgo the agent's compensation where the principal alleges the agent has breached his fiduciary duties to the principal. In *Rockefeller v. Grabow*, the Idaho Supreme Court explained this cause of action, as to real estate agents, as follows:

It is the established law of this jurisdiction that an agent's right to compensation will be affected by a violation of his fiduciary duties. *See, e.g., Cooke v. Iverson*, 94 Idaho 929, 933, 500 P.2d 830, 835 (1972) (real estate agents lose their commissions for failure to disclose material facts); *Schroeder v. Rose*, 108 Idaho 707, 710, 701 P.2d 327, 330 (Ct. App. 1985) (compliance with fiduciary duties is a condition precedent to collecting a commission); *see also* RESTATEMENT (SECOND) OF AGENCY §§ 456 and 469 (1958). Allowing an agent to retain his entire commission as a matter of law when he has breached his fiduciary duties would eviscerate agency law. Secure in his compensation from the principal as long as the assigned task is

completed, an agent's only chance of loss from violating his duties would be if he harmed the principal. The higher requirement of acting in the interest of the principal, without a means of enforcement, would simply cease to exist.

136 Idaho 637, 642, 39 P.3d 577, 582 (2001) (*Rockefeller I*). The Idaho Supreme Court has permitted similar claims in other agent/principal relationships. See *Sorenson v. Saint Alphonsus Reg'l Med. Ctr., Inc.*, 141 Idaho 754, 118 P.3d 86 (2005) (retirement plan manager as fiduciary to plan participants); *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 125 Idaho 607, 873 P.2d 861 (1994) (lawyer acting as depository of funds on behalf of non-client); *All American Realty, Inc. v. Sweet*, 107 Idaho 229, 687 P.2d 1356 (1984) (lawyer acting as closing agent in real estate transaction as agent of third parties having interest in transaction); and *Jensen v. Sidney Stevens Implement Co.*, 36 Idaho 348, 210 P. 1003 (1922) (employee as agent of employer). See also, *Stearns v. Williams*, 72 Idaho 276, 240 P.2d 833 (1952) (finding a contract void as a matter of public policy because a government geologist breached his fiduciary duties to the public by executing the contract). Examples of relationships from which the law will recognize a fiduciary relationship also include: members of the same family, partners, attorney and client, executor and beneficiary of an estate, insurer and insured, and close friends. *Mitchell v. Barendregt*, 120 Idaho 837, 820 P.2d 707 (Ct. App. 1991). The Idaho Supreme Court has held that lawyers owe their clients fiduciary duties as a result of the lawyer-client relationship. *Idaho State Bar v. Williams*, 122 Idaho 404, 834 P.2d 1320 (1992) (lawyer breached fiduciary duty to client by committing battery upon her).

As the Idaho Supreme Court's statement in *Rockefeller I* quoted above makes clear, the remedy for an agent's breach of a fiduciary duty to his principal may include loss of the agent's right to compensation for the services the agent rendered to the principal. See also RESTATEMENT (SECOND) OF AGENCY §§ 456 and 469 (1958). Thus there is some logic to Plaintiff's position that she may bring a cause of action against her lawyer for either professional negligence (malpractice) or for breach of his fiduciary duties to her; each may require her to prove different facts and each may entitle her to different remedies, but, she argues, there is no reason she may not pick and choose which action to bring as she sees fit.

Defendant disagrees. Defendant argues the lawyer-client relationship is different from other fiduciary or agency relationships. Defendant seems to acknowledge that an Idaho client may sue her lawyer for breach of a duty if that duty does not arise from the lawyer's standard of care as a professional. For example, if an attorney entered into a contract with a client whereby the attorney undertook an obligation to perform a certain action and failed to perform that action, the client could sue for breach of the contract. *See Johnson v. Jones*, 103 Idaho 702, 704, 706-07, 652 P.2d 650, 652, 654-55 (1982). Similarly, if an attorney agreed to provide a standard of care above the local standard for reasonably competent attorneys, a client could bring a breach of contract action if the lawyer were to breach that express higher standard. *See Bishop v. Owens*, 152 Idaho 616, 620, 272 P.3d 1247, 1251 (2012) ("If an attorney and client want to provide for a higher standard of care, they may do so by express language in the contract."). However, Defendant argues that if a client is alleging breach of a duty that a lawyer owed that client under the professional standard of care governing attorneys, then the client may only bring an action for malpractice; even if the lawyer and client executed a contract which created identical duties for the lawyer and even if the duty breached is one the law would have imposed on the lawyer as a fiduciary irrespective of the standards of his profession. Of course, if Defendant is correct, this means the client would not have available to her the equitable remedies available to other principals whose agents violate their fiduciary duties to that principal. The client would have a cause of action only if the lawyer's breach of the duty actually caused her economic damage. Defendant argues the lawyer-client relationship is different from other agent-principal relationships in this regard, such as the real estate agent-customer relationship discussed in *Rockefeller I*, because, Defendant argues, the Idaho Supreme Court has said it is different. The Court addresses those arguments below. Before doing so, it is necessary to put the arguments into some legal and historical context.

Dealing with the problematic lawyer has and continues to be problematic for the states. It is problematic in part because a lawyer's duties to his client can arise from more than one source. A lawyer may owe his client particular duties because he and the client have mutually agreed that the lawyer will owe the client those duties in exchange for

consideration provided by the client to the lawyer, generally payment of a fee. The duties can be unique to that particular lawyer, that particular client, and the particular service that client wants the lawyer to perform. As it does for other parties who enter such agreements, the law provides a mechanism by which the client may seek to recover damage she suffered as a result of the lawyer's failure to abide by or fulfill his agreement. That mechanism is a suit for breach of contract.

The lawyer is also a professional. Like many other professionals, attorneys collectively hold themselves and each other to certain standards. The law provides a mechanism by which the client may seek to recover damage she suffered because the attorney has failed to act consistently with the standards of his profession. That remedy is a suit for professional negligence. That remedy is available even in the absence of an agreement between the lawyer and client that the lawyer will live up to those standards.

Depending upon the service the lawyer is hired to perform, the law may also view the lawyer as being an agent for his client. The common law developed rules and remedies to protect a person, called the principal, who empowers another, called the agent, to act on his behalf. RESTATEMENT (SECOND) OF AGENCY § 1 (1958). This relationship is described as a fiduciary one; i.e. one of trust. *Id.* Black's Law describes a fiduciary as: "Someone who is required to act for the benefit of another person on all matters within the scope of their relationship." Black's Law Dictionary 10<sup>th</sup> Ed. 743. The law developed duties the agent owes to his principal. The Idaho Supreme Court has previously approved of the following description of some of those duties:

Loyalty to his trust is the first duty which an agent owes to his principal. It follows as a necessary conclusion that the agent must not put himself in such a relationship that his interests become antagonistic to those of his principal. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal. So it is the duty of the agent to make his principal a full and complete disclosure of all facts relative to the subject of his agency which it may be material to the principal to know. And, if an agent makes any profit in the course of his agency because of his failure to inform his principal of facts known to him, or which in the exercise of due diligence he should have ascertained for his principal, the profits of such transaction, as a matter of law, will belong exclusively to the agent's principal. The law guards the fiduciary relation,

which the relation of principal and agent is, with jealous care. It seeks to prevent the possibility of a conflict between duty and personal interest. It demands that the agent shall work with an eye single to the interest of his principal. It forbids him from acting adversely to his principal, either for himself or for others.

*Jensen v. Sidney Stevens Implement Co.*, 36 Idaho 348, 353, 210 P. 1003, 1005 (1922). Courts have historically provided to principals whose agents breach their fiduciary duties a broader range of remedies than a suit to recover actual damages. As the Supreme Court explained in *Rockefeller I*, quoted above, one remedy available to a principal when the agent breaches his fiduciary duties is to force the agent to return (disgorge) some or all of the compensation the principal paid the agent for the agent's services. *See also*, RESTATEMENT (SECOND) OF AGENCY § 469 (1958) (stating that agent is entitled to no compensation for conduct that is disobedient or breaches agent's duty of loyalty to principal).

These various sources of imposing duties upon an attorney and the various remedies available to the client in the event the lawyer breaches those duties raise many questions to be resolved by the courts. If an attorney commits a single act that breaches his contractual, professional, and fiduciary duties to a client, is the client entitled to bring suit for breach of contract, malpractice, and breach of a fiduciary duty? Only one? Does the answer depend on the nature of the act? The nature of the duty breached? The remedy being sought by the client? A particularly difficult question is the question raised in this dispute – may a client pursue a claim for breach of fiduciary duty against her lawyer and seek disgorgement of some or all of the fees she paid the lawyer when the client has suffered no actual damage from the lawyer's breach of any duty and, therefore, could not recover anything in a suit for breach of contract or malpractice?

Lawyers, courts, and legal scholars have wrestled with these questions for some time, particularly the question presented here. Some scholars have argued that courts should permit clients to sue their attorneys for breach of any fiduciary duty and should order attorneys who do so to disgorge fees paid them by the client under a broad range of circumstances. *See Ray Ryden Anderson & Walter W. Steele, Jr., Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. Rev. 235 (1994).

The Restatement of the Law Governing Lawyers advocates permitting clients to bring breach of fiduciary duty claims, like other principals may, but only where the breach of the duty has been clear and serious. The Restatement also advocates limiting the circumstances in which the lawyer is compelled to disgorge all of his fees. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000).

One scholar argues, for policy reasons, that claims for fiduciary breach and the remedy of fee disgorgement should be limited to those situations where the lawyer commits a crime against the client, where the lawyer commits an actual fraud against the client, and where the lawyer breaches a fiduciary duty and the client suffers actual damage from that breach, but the client cannot pursue a claim for professional malpractice because the lawyer was not negligent in the performance of the service the client hired him to perform. See Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 Wake Forest L. Rev. 1137 (1999). Another scholar advocates limiting fiduciary breach claims, and the remedy of fee disgorgement, not for policy reasons, but simply as a pragmatic matter to enable trial courts to apply the claim and the remedy in a somewhat logically and historically consistent manner. See Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 Hofstra L. Rev. 689 (2006).

The states have taken differing approaches to these issues. The Texas Supreme Court has explicitly permitted clients to bring a claim for breach of a fiduciary duty against the client's former attorney even where the client has suffered no actual damages. *Burrow v. Arce*, 997 S.W. 2d 229, 245 (Tex. 1999). The Texas Supreme Court adopted the rule regarding fee forfeiture from the Restatement (Third) of the Law Governing Lawyers. *Id.* The courts of Washington, Minnesota, and the District of Columbia similarly permit such claims. See *Eriks v. Denver*, 824 P.2d 1207 (Wash. 1992); *Gilchrist v. Perl*, 387 N.W. 2d 412 (Minn. 1986); and *Hendry v. Pelland*, 73 F.3d 397, 401 (D.C. Cir. 1996). The courts of New York permit clients to bring breach of fiduciary duty claims against an attorney, but will dismiss such claims as redundant if they are premised on the same facts and seek identical relief as a claim for legal malpractice. See *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 780 N.Y.S. 2d 593 (N.Y. App. Div. 2004). The



Supreme Court of California has held that a plaintiff is not entitled to the remedy of fee disgorgement if the plaintiff cannot show actual damage from breach of the fiduciary duty. *See Frye v. Tenderloin Housing Clinic, Inc.*, 129 P.3d 408, 423-24 (Cal. 2006); *see also Slovensky v. Friedman*, 49 Cal. Rptr. 3d 60 (Cal. Ct. App. 2006), *review denied*, (discussing the *Frye* rule).

The parties argue that the Idaho Supreme Court has previously decided whether a client in Idaho may sue her lawyer for breach of a fiduciary duty in the absence of any actual damages. Not surprisingly, the parties each argue the Idaho Supreme Court has reached a different answer to that question.

**B. THE PARTIES' ARGUMENTS ABOUT WHETHER IDAHO RECOGNIZES THE TORT OF BREACH OF FIDUCIARY DUTY WHERE THE FIDUCIARY DUTY ARISES FROM THE ATTORNEY-CLIENT RELATIONSHIP.**

Plaintiff argues that the Idaho Supreme Court implicitly adopted the rules of the Restatement (Third) of Law Governing Lawyers in *Rockefeller I*. Plaintiff argues that the Court in *Rockefeller I* cited to *Burrow v Arce*, a case involving a breach of fiduciary duty by an attorney, where the Texas Supreme Court did explicitly adopt the rules of the Restatement. Plaintiff points out much of the language the Court used in *Rockefeller I* to explain the rationale behind permitting actions to compel disgorgement of fees is similar to the language used in the Restatement. Therefore, Plaintiff argues, the Court adopted the rules in the Restatement for Idaho, despite the fact that *Rockefeller I* involved an agent who was not an attorney.

Defendant argues the Idaho Supreme Court has said lawyers are different and that the claims available to other parties in certain relationships are not available to those in the attorney client relationship. Defendant argues that when a plaintiff's claim against her former attorney arises out of the professional relationship with him, the only claim that she may properly assert is one for professional negligence. Defendant cites to *Griggs v. Nash*, 116 Idaho 228, 232, 775 P.2d 120, 124 (1989); *Lapham v. Stewart*, 137 Idaho 582, 588, 51 P.3d 396, 402 (2002); *Bishop v. Owens*, 152 Idaho 616, 621, 272 P.3d 1247, 1252 (2012);

and *Greenfield v. Smith*, 162 Idaho 246, \_\_\_, 395 P.3d 1279, 1284 (2017) in support of this argument.

In *Griggs*, the defendants filed a third party complaint seeking indemnity or contribution from their attorney based on alleged breach of a fiduciary relationship and negligence by their attorney. *Griggs*, 116 Idaho at 229, 775 P.2d at 121. The Court concluded that the action was not in fact an action for indemnity or contribution. *Id.* at 231, 775 P.2d at 123. The Court stated:

The third-party complaint is drawn in the form of an action for indemnity or contribution. It alleges that the liability of EMSI and Van Gelder to the Griggses, if any, resulted from the acts or omissions of Trout. It alleges that Trout's breaches of his fiduciary duty and/or his negligence were the proximate cause of the damages. However, the claims in the third-party complaint are not based on any of the theories upon which the right to indemnity or contribution may be made. The only basis for the claims is Trout's alleged malpractice in his representation of EMSI and Van Gelder.

*Id.* The Court held that the statute of limitations for professional malpractice actions barred the third party claims. The Court found support for its rationale in the decision by the Ohio Court of Appeals in *Muir v. Hadler Real Estate Mgmt. Co.*, 446 N.E. 2d 820 (Ohio Ct. App. 1982). *Griggs*, 116 Idaho at 232, 775 P.2d at 124. The Idaho Supreme Court approved the following language used by the Ohio Supreme Court:

An action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of [the statute of limitations for malpractice], regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages... Malpractice by any other name still constitutes malpractice.

*Id.*, citing *Muir*, 446 N.E. 2d at 822. The Court's decision in *Griggs* does not precisely answer the question here. The Court did not discuss any distinction between the third party plaintiffs' claim that their attorney had breached a fiduciary duty and their claim that their attorney had been negligent. The Court simply held that the third party complaint in that case alleged a claim for malpractice and therefore was barred by the statute of limitations applicable to malpractice actions. While the Court's use of the Ohio Supreme Court's language suggests the Idaho Supreme Court might be inclined to follow Ohio Supreme

Court's precedent and bar plaintiffs from bringing claims for breach of a fiduciary duty against their attorneys, at least if such claims are barred by the statute of limitations for professional negligence claims, the Idaho Supreme Court did not decide that issue in *Griggs*.

In *Lapham*, the plaintiff, through an agent, hired defendant Stewart, an attorney, to prepare loan documents and to assist in closing a transaction where Lapham was lending funds to others secured by an interest in real property. *Lapham*, 137 Idaho at 584, 51 P.3d at 398. When the loan closed, Lapham's attorney received the loan proceeds and allegedly distributed the proceeds to the borrower without Lapham's approval. *Id.* Lapham alleged his agent had instructed Stewart not to disburse the funds without Lapham's approval. *Id.* After the borrower defaulted on the loan, Lapham brought an action for legal malpractice against Stewart. He later sought permission to amend his complaint to include claims for professional negligence, negligence, breach of fiduciary duty, and breach of contract. The district court denied his motion to amend and dismissed the claim for professional negligence as being barred by the statute of limitations. *Id.* at 585, 51 P.3d at 399.

In affirming the district court's decision to deny the motion to amend, the Idaho Supreme Court focused on the language of I.C. § 5-219(4). The Court stated:

Lapham contends that the claims for negligence, breach of contract, and breach of fiduciary duty are distinct from his claim for professional malpractice and are not included within the scope of Idaho Code § 5-219(4). That statute applies to "professional malpractice," which it defines as "wrongful acts or omissions in the performance of professional services by any person, firm, association, entity or corporation *licensed to perform such services under the law of the state of Idaho.*"

*Id.* at 588, 51 P.3d at 402 (emphasis in original) (footnote omitted). The Court held that I.C. § 5-219(4) bars untimely claims even if such claims are not alleged as a negligence action. The Court held the language of the statute precludes any untimely claim where the allegation is a licensed professional committed a wrongful act or omission in the performance of that professional service, whether the claim was grounded in tort or breach of contract. *See id.* at 588 n.4, 51 P.3d at 402 n.4.

This Court concludes I.C. § 5-219 is applicable to Plaintiff's complaint in this action for the reasons articulated by the Supreme Court in *Lapham*. However, that does not

resolve the instant motion. Defendant has not argued that Plaintiff's claims are barred by the statute of limitations. Nothing else in *Lapham* answers the questions presented here.

In *Bishop*, a client sued her former attorney, defendant Owens, for both professional negligence and breach of contract. During litigation the client died and plaintiff Bishop pursued the claims as the client's personal representative. Defendant Owens argued that the claim for professional negligence abated on the client's death and that the claim for breach of contract failed to state a valid claim for relief because it simply reasserted the professional negligence claim. The Court held that "Bishop's breach of contract claim, which asserts the same claim as the legal malpractice theory, which has traditionally been treated as the proper claim, fails to state a claim upon which relief can be granted." *Bishop*, 152 Idaho at 621, 272 P.3d at 1252. The majority in *Bishop* cited three concerns that led them to reach this result: that to hold otherwise would create a per se breach of contract action in every legal malpractice action, would render the statute of limitations applying to legal malpractice actions moot, and would call into question the standard of care regarding legal malpractice actions and the application of the economic loss rule to legal malpractice claims. *Id.* Defendant argues this holding is equally applicable to Plaintiff's claim for breach of a fiduciary duty. However, the Court in *Bishop* did not discuss claims for breach of fiduciary duty. The Court's holding was simply that the breach of contract claim made by *Bishop* did not state a claim for relief. That holding was limited to the specific claim made in that case. If that holding is binding on this Court in this case it is only because the rationale applied by the Court in *Bishop* would compel a similar result here.

The majority's rationale in *Bishop* is candidly difficult for this Court to understand. Therefore this Court struggles to determine how it should apply here. A breach of contract claim would arise only where the contract expressly set forth a standard of care the attorney agreed to be held to. As Justice Horton points out in his dissent, nothing requires an attorney to agree to an express standard of care in contracts with his clients. *See Id.* at 626, 272 P.3d at 1257 (Horton, J., dissenting). In cases where the attorney does not expressly agree in the contract to undertake any duties, or specify the manner in which he will perform his services, the law will impose duties on the attorney under the local

standard of practice for professionals and breach of those duties is actionable in negligence, not contract.

Justice Jim Jones stated in his concurring opinion that a plaintiff may still sue her lawyer for breach of contract. *Id.* at 622-23, 272 P.3d at 1253-54. However, that apparently only applies where the contract expressly creates a duty the law would not otherwise also impose on the lawyer as a professional. *Id.* Reading both the majority opinion and Justice Jim Jones' concurring opinion, the Court's decision in *Bishop* seems to stand for the following proposition: a client cannot sue her attorney in both negligence and contract if the manner in which the client alleges the attorney breached the provisions of the contract is the same as the manner in which the client alleges the attorney breached the local standard of care. Stated another way, where a contract and the law impose identical duties on a legal professional, a client may only bring an action to recover for breach of the duty imposed by law.

This conclusion seems contrary to Idaho Rule of Civil Procedure 8(d) that expressly permits a party to allege claims in the alternative. Some states, like New York, do not permit parties to allege duplicitous claims for relief. *See Kordower-Zetlin v. Home Depot U.S.A., Inc.*, 22 N.Y.S. 3d 22 (N.Y. App. Div. 2015). Not surprisingly, as discussed above, New York courts will typically dismiss a claim for breach of a fiduciary duty if the claim is duplicitous of a claim for professional negligence.

Historically plaintiffs in Idaho have been permitted to seek alternative forms of relief under a single factual and legal theory, *M.K. Transp., Inc., v. Grover*, 101 Idaho 345, 612 P.2d 1192 (1980), and to pursue alternative legal claims given one particular factual scenario, *Thomas v. Thomas*, 150 Idaho 636, 249 P.3d 829 (2011). The Court in *Bishop* did not discuss I.R.C.P. 8(d) or otherwise explain its concern about alternative claims by plaintiffs in malpractice cases. This Court concludes the majority in *Bishop* intended the rule announced in *Bishop* to be an exception to I.R.C.P. 8(d); an exception that applies, if nowhere else, in legal malpractice cases. Whether that rule should bar Plaintiff's claim in this case depends on whether the reasons the Court adopted the rule in *Bishop* should apply equally to breach of fiduciary duty claims as it does to claims for breach of contract.

Therefore, this Court will return to examining the expressed rationale behind the holding in *Bishop*.

The Supreme Court stated that to permit Bishop to bring a claim for breach of contract that is essentially identical to a claim for professional negligence would render the statute of limitations for professional malpractice actions moot. *Bishop*, 152 Idaho at 621, 272 P.3d at 1252. This statement seems inconsistent with the language of I.C. § 5-219 and the Court's decision in *Lapham*. As the Court explained in *Lapham*, the language of I.C. § 5-219 is not specific to actions in negligence. The statute places a limitation on when a plaintiff may file any action to recover damages for a wrongful act or omission in the performance of professional services by any person, firm, association, entity or corporation licensed to perform such services under the law of the state of Idaho. I.C. § 5-219(4). The language of the statute seems to apply to actions where the plaintiff alleges the wrongful act was a breach of the express terms of a contract for professional services and to actions where the plaintiff alleges the wrongful act was a breach of some duty imposed by law on the professional. The Court stated as much in footnote 4 in its decision in *Lapham*. *Lapham*, 137 Idaho at 588 n. 4, 51 P.3d at 402 n. 4. Therefore, it seems unnecessary to bar plaintiffs from asserting alternative claims for breach of contract and professional negligence against their attorneys simply to avoid making I.C. § 5-219(4) moot. The statute would bar both claims if filed after the deadline set in that statute. In any event, that rationale is not helpful in resolving Defendant's motion in this case. As stated above, this Court believes I.C. § 5-219(4) is applicable to Plaintiff's breach of fiduciary duty claim because she is alleging that a licensed professional committed a wrongful act (breach of a fiduciary duty) in the performance of professional services. That statute would not be moot if this Court permits her claim to proceed. There simply has been no argument that her claim is untimely under I.C. § 5-219(4).

The Court also expressed concern in *Bishop* that if it permitted Bishop's claim for breach of contract to proceed, doing so "would also call into question matters such as the standard of care regarding legal malpractice actions, which is to comply with the local standard of care by an attorney, as well as the application of the economic loss rule to legal

malpractice claims.” *Bishop*, 152 Idaho at 621, 272 P.3d at 1252. The majority did not further elucidate these concerns.

At the risk of further confessions of inability, this Court is not sure it understands either of these concerns. As both Justice Jim Jones and Justice Horton articulated in their opinions, a lawyer may agree to undertake specific duties in a contract and be liable in contract for breaching those duties. Whatever duty the lawyer agreed to undertake in the contract, the law would still impose those duties on the lawyer applicable under the local standard of care and the lawyer would be liable for damages caused by breach of those duties in negligence.<sup>1</sup> Depending upon the language of the contract, the lawyer might be liable to the client for breach of the contract, but not negligence; for negligence, but not breach of the contract; neither; or both. However, permitting a client to bring both actions seems unlikely to create confusion as to the local standard of care. The local standard of care would not change except in a very broad way due to changing customer expectations. Hypothetically, if more and more attorneys started agreeing in their contracts to perform their services in a manner that was more stringent or more demanding than that which would otherwise be expected under the local standard of care existing at the time the contract was made; eventually, the local standard of care will rise to match what the majority of attorneys were agreeing to do in their contracts. This is simply another way of saying that the local standard of care is a local one. However, this will occur regardless of whether courts permit clients to pursue actions against their attorneys for breach of contract in addition to actions for negligence. As lawyers in an area become more competitive and start providing a higher and higher standard of care for their clients, the minimum standards expected of all lawyers in that area will increase. Those issues and sources of confusion will exist regardless of whether clients are permitted to sue their attorneys for breaching contracts.

Therefore, this Court remains uncertain of the *Bishop* majority’s concern. The standard of care owed by a lawyer to his client in a certain area is a question of law. Generally a plaintiff must present expert testimony to establish a defendant has breached

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<sup>1</sup> Lawyers cannot, by contract, relieve themselves of the duty to perform their professional services consistently with the local standard of care.

this standard. What duties the lawyer owed his client under that standard will be given to the jury by the Court in its instructions. Any duties a lawyer agrees to be responsible to perform in a contract will be set forth in the contract. What that duty was will be determined by the language of the contract. Having to decide whether the lawyer's act breached both the duty under the local standard of care as set forth in the Court's instructions and the duty set forth in the language of the contract itself seems no more difficult in the context of a lawyer-client relationship than in any other case where a plaintiff alleges breach of contract and negligence.

The *Bishop* majority's concern regarding the application of the economic loss rule is also difficult to understand. The economic loss rule states generally that a claimant may not recover purely economic losses in a negligence action because the law does not impose a general duty upon everyone to protect others from economic loss. *Duffin v. Idaho Crop Improvement Ass'n.*, 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995); *Tusch Enters. v. Coffin*, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987); *Clark v. Int'l Harvester Co.*, 99 Idaho 326, 336, 581 P.2d 784, 794 (1978). However, there is an exception to this general rule in cases where a professional performs personal services for another. In that case, the law imposes a duty on the professional to protect the client from economic loss and, therefore, the client may recover for economic losses caused by the professional's negligence in performing those duties. *McAlvain v. General Ins. Co. of America*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976). Professional negligence actions therefore almost always involve an exception to the economic loss rule. How the economic loss rule applies to professional negligence actions seems a question unlikely to be impacted by permitting a client to bring a separate claim alleging that her attorney violated the specific language of the contract she entered into with him. A lawyer will always owe to a client those duties mandated by the local standards of his profession. While the scope of the tasks the client wishes the lawyer to perform will necessarily be set by the lawyer and client's agreement, the lawyer will always be bound to perform those tasks consistent with the local standards of his profession or be liable to his client in negligence for having failed to do so. This is so simply because of the existence of the relationship between the lawyer and the client; not the language of their specific agreement.



However, there seems little difficulty with permitting lawyers to expressly agree to additional duties or a greater standard of care if a lawyer chooses to do so. Adjudicating a client's claim that her lawyer also violated a duty the lawyer specifically agreed to perform in a contract, even if the act or omission the client alleges violated both duties is the same, seems no more complicated in the context of an attorney-client relationship than it is in the multitude of other circumstances where the courts permit plaintiffs to alternatively allege that a defendant's single act breached both the express terms of a contract (breach of contract) and the unwritten terms the law implies in every contract (breach of implied warranty), or where the plaintiff claims a defendant's single act breached a duty owed to the plaintiff that has been expressly set by the legislature (negligence per se) and also breached a duty the courts simply impose on any defendant in that situation (negligence).

By this discussion, this Court is not intending to be critical of the Supreme Court's decision in *Bishop* or of the majority's opinion in that case. This Court is simply attempting to be transparent about how this Court evaluates Defendant's argument that the Supreme Court's holding in *Bishop* compels this Court to grant Defendant's motion.

The final rationale stated by the majority in *Bishop* for its conclusion is that the legal malpractice theory "has traditionally been treated as the proper claim" in such circumstances. *Bishop*, 152 Idaho at 621, 272 P.3d at 1252. Justice Horton pointed out in his dissent that he was unaware of any prior instance where the Court determined a party may be relieved of liability for the breach of an express term of a written contract on the basis that the plaintiff advanced the wrong theory. *Id.* at 625, 272 P.3d at 1256. Certainly this rationale for barring breach of contract actions would apply equally to Plaintiff's breach of fiduciary duty claim. This Court concludes the Supreme Court in *Bishop* expressed that plaintiffs whose claims "traditionally" have been treated as claims for legal professional negligence may not alternatively allege relief under some other legal theory based on the same facts. This rule appears to be unique to plaintiffs in legal professional negligence actions.

Lastly, Defendant cites to *Greenfield v. Smith*, 162 Idaho 246, 395 P.3d 1279 (2017). In *Greenfield*, a client sued her former attorney and alleged claims for negligence, breach of contract, breach of the covenant of good faith and fair dealing implied by law in

such contract, tortious interference with prospective economic advantage, intentional infliction of emotional distress, negligent infliction of emotional distress, and fraud. All of the claims came from complaints about how the lawyer had represented her in a prior criminal case and a prior civil action. *Id.* at \_\_\_, 395 P.3d at 1273. The district court dismissed the fraud claim for a defect in the pleadings. The district court determined all of the remaining claims were subject to the statute of limitations for professional malpractice actions: I.C. § 5-219(4). The Supreme Court agreed. The Court again affirmed the holding in *Lapham* that I.C. § 5-219(4) includes more than negligence actions. Its time limitations apply to any claim for damage as a result of a wrongful act or omission in the performance of a professional service by a person licensed in Idaho to perform such service. *Greenfield*, 162 Idaho at \_\_\_, 395 P.3d at 1283-84.

The Court's holding in *Greenfield* does not support Defendant's argument here. Defendant argues that *Greenfield* stands for the proposition that a plaintiff may only bring a professional negligence action against her lawyer when she alleges the lawyer committed wrongful acts in the course of rendering her professional services. There is some language in *Greenfield* from which Defendant might understandably reach this conclusion. The Supreme Court holds in part one of its opinion that all of the plaintiff's various contract and tort claims are subject to the statute of limitations governing professional malpractice actions. *Id.* In part three of its opinion the Court then writes that "[i]n order to establish a claim for legal malpractice the plaintiff must show: '(a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) a breach of duty by the lawyer (i.e., the lawyer's conduct fell below the standard of care); and (d) the lawyer's deficient performance proximately caused damages.'" *Id.* at \_\_\_, 395 P.3d at 1285. Defendant concludes that every plaintiff alleging that a licensed attorney committed a wrongful act in the course of rendering the plaintiff services must prove the elements of a negligence claim. This Court does not read the language in *Greenfield* so broadly. Courts frequently, and perhaps confusingly, use the term "malpractice" when referring to a claim for professional negligence. However, as the Supreme Court made clear in *Lapham*, the definition of "malpractice" in I.C. § 5-219 is significantly broader. It includes claims other than those in professional negligence. In parts one and three of its opinion in *Greenfield*,

the Court was using the term “malpractice” to mean different things. In part one, the Court was referring to all those claims that subject to the temporally limitations in I.C. § 5-219. This includes more than claims for professional negligence. In part three of its opinion, the Court was simply setting forth the elements of a professional negligence claim. By using the term legal malpractice instead of legal professional negligence, the Court did not hold that every possible claim that might be barred by I.C. § 5-219(4) is necessarily converted into a claim for professional negligence and the plaintiff must therefore prove the elements of that claim and that claim alone. For example, the Court did not hold that the plaintiff was precluded from bringing her claim for intentional infliction of emotional distress unless she could prove the elements of the professional negligence claim or that she could never sue her attorney for intentional infliction of emotional distress. The Court simply held that her intentional infliction of emotional distress claim was barred by the statute of limitations applicable to professional malpractice actions because it arose out of an alleged wrongful act by a licensed professional in the performance of professional services. Nothing about the holding in *Greenfield* supports Defendant’s argument that plaintiffs are barred from bringing breach of fiduciary duty claims against their former attorneys, assuming such claims are timely under I.C. § 5-219(4).

**C. IDAHO PERMITS PLAINTIFFS TO BRING A CLAIM FOR BREACH OF FIDUCIARY DUTY WHERE THE FIDUCIARY DUTY ARISES FROM THE LAWYER-CLIENT RELATIONSHIP; HOWEVER, THE CLAIM MUST BE DISTINCT FROM A CLAIM FOR PROFESSIONAL NEGLIGENCE.**

This Court concludes the Idaho Supreme Court has not expressly prohibited clients from bringing breach of fiduciary duty claims against their attorneys. This Court concludes that the Idaho Supreme Court has not categorically barred principals from suing their agent for alleged breaches of the agent’s fiduciary duty simply because the fiduciary duty arose from an attorney-client relationship.

However, the Supreme Court’s holding in *Bishop* seems to stand for the proposition that the Supreme Court will not permit clients in Idaho to sue their attorneys under a legal theory other than professional negligence if the client’s claim is one that could be brought

in professional negligence. As discussed above, the Court appears to have reached the decision it did in *Bishop* because the language of the contract Bishop alleged her attorney breached was the functional equivalent of a duty the law imposed on her attorney anyway. *See Bishop*, 152 Idaho at 621, 272 P.3d at 12521 (“The language in the contingent fee agreement that ‘[a]ttorneys shall represent Client in said matter and do all things necessary, appropriate, or advisable, in regard thereto’ is not materially different from the standard applied in the legal malpractice claim.”). *See also, id.* at 626 n.3, 272 P.3d at 1257 n.3 (Horton, J., dissenting).

This Court concludes the rationale expressed in *Bishop* as to Bishop’s breach of contract claim apply well enough to claims for breach of fiduciary duty claim so as to compel this Court to reach a similar conclusion. There are some distinctions between a breach of contract claim and a breach of fiduciary duty claim. One obvious difference is the available remedies. In a breach of contract claim the plaintiff must show causation and damages in addition to showing breach of the contract itself. The plaintiff in *Bishop* was alleging the same damages were caused by her attorney’s breach of the terms of the contract as were caused by his breach of the local standard of care for professionals. Her remedy was identical under either claim. The only benefit to her at trial in alleging both claims would have been the ability to argue the attorney breached the slightly different wording of his duties under the contract versus the duties imposed by law. Perhaps the Supreme Court simply concluded that where her remedy was the same either way, it was going to require her to assert the traditional cause of action for the sake of efficiency and to avoid confusion.

In a breach of fiduciary duty claim, the remedies can be vastly different. This case is a perfect example. Defendant claims she has no actual injuries; thus she cannot prove a claim for professional malpractice. She is seeking only the remedy of fee disgorgement, which she argues she is entitled to in equity because Defendant did an act that she alleges damaged not her, but rather their relationship. Should that be sufficient to avoid the result in *Bishop*? This Court feels compelled by *Bishop* to hold otherwise, for this reason: In *Bishop*, the distinction between a claim sounding in contract and a claim sounding in negligence had a significant practical effect given the original client’s death. The claim in

negligence abated upon the client's death; the claim in contract did not. In *Bishop*, permitting the plaintiff to pursue alternative claims for breach of contract and professional negligence would have had the practical effect of permitting the plaintiff to pursue the breach of contract claim. Thus, while the legal remedy (compensatory damages) for each claim was the same; the practical remedies available were vastly different. This fact was not sufficient to prevent the Supreme Court from adopting its apparently unique rule for suits against lawyers – if a claim can be asserted as both one for breach of contract and one for professional negligence, only the claim for professional negligence can be brought, regardless of whether that limits or eliminates any remedy.

This Court feels compelled to reach the same result here. In other words, if a plaintiff's claim for professional negligence and for breach of fiduciary duty are identical except for the remedy being sought – actual damages versus fee disgorgement – the plaintiff may only pursue the claim for professional negligence. This conclusion seems consistent with the Supreme Court's rationale and holding in *Bishop*.

However, as discussed above, that does not mean a plaintiff is precluded from bringing a breach of fiduciary duty claim simply because the fiduciary duty is one that arose because of an attorney-client relationship. In *Bishop*, the Supreme Court's concern was not that the duties Bishop alleged the attorney breached arose from different sources: language of the contract versus the local standard of care for legal professionals. Rather, the Court's concern appeared to be that the duty that arose under each was essentially the same. Therefore, it seems appropriate not to focus on the source of the duty Plaintiff alleges Defendant breached, but rather precisely what that duty was and how it was allegedly breached.

Despite allowing clients to bring claims for breach of a fiduciary duty against their attorneys, the courts of Texas have precluded plaintiffs from bringing a claim for breach of fiduciary duty and a claim for professional negligence where those claims would be duplicitous. Texas courts refer to this rule as the rule against "fracturing" professional negligence claims against attorneys. The Texas Court of Appeals has explained the rule as follows:

The rule against “fracturing” professional negligence claims against attorneys holds that “a case arising out of an attorney’s alleged bad legal advice or improper representation” may not “be split out into separate claims for negligence, breach of contract, or fraud [(or any other non-negligence theory)] because the real issue remains one of whether the professional exercised that degree of care, skill, and diligence that professionals of ordinary skill and knowledge commonly possess and exercise.”...

On the other hand, “when cases say that clients cannot divide or fracture their negligence claims against their attorneys into other claims, this does not mean that clients can sue their attorneys only for negligence.” Nor does the non-fracturing rule necessarily bar a client from simultaneously asserting professional negligence and non-negligence claims against an attorney that are predicated on some common or overlapping facts. However, the claimant must do more than “merely reassert the same claim for legal malpractice under an alternative label.” “The plaintiff must present a claim that goes beyond what traditionally has been characterized as legal malpractice.”

*Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W. 3d 416, 426-27 (Tex. Ct. App. 2009) (internal citations omitted). The Texas courts have applied this rule to distinguish between enforceable claims for breach of a fiduciary duty arising from the attorney-client relationship and claims for professional negligence by an attorney. The Texas Court of Appeals explained the distinction as follows:

In determining whether a complaint is a claim for negligence or something else, “we are not bound by the labels the parties place on their claims.” “Regardless of the theory a plaintiff pleads, as long as the crux of the complaint is that the plaintiff’s attorney did not provide adequate legal representation, the claim is one for legal malpractice.” This analysis focuses primarily on ascertaining whether the facts that are the basis for an asserted cause of action implicate only the lawyer’s duty of ordinary care or independently actionable fiduciary, statutory, contractual, or other tort duties. As the Fourteenth Court of Appeals has summarized the analysis:

If the gist of a client’s complaint is that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be pursued as a negligence claim, rather than some other claim. If, however, the client’s complaint is more appropriately classified as another claim, for example, fraud, DTPA, breach of fiduciary duty, or breach of contract, then the client can assert a claim other than negligence.

This inquiry may also be informed by the remedy the plaintiff seeks. The analysis is analogous to determining whether claims are based on contract versus the DTPA or whether they sound in contract or tort. The determination of whether a complaint against a lawyer is actionable in negligence versus some other legal theory is a question of law....

In addition to the duty of ordinary care, an attorney owes fiduciary duties to his client as a matter of law. The term “fiduciary” refers to integrity and fidelity; thus, “the attorney-client relationship is one of the most abundant good faith, requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception.” Attorneys must, among other things, “render a full and fair disclosure of facts material to the client’s representation.” To prevail on a breach-of-fiduciary-duty claim, a plaintiff must prove (1) the existence of the fiduciary relationship; (2) a breach of that duty by the attorney defendant; (3) that causes; and (4) damages to the plaintiff. However, if a client seeks the remedy of equitable fee forfeiture and proves a breach of fiduciary duty by the attorney, the client may obtain that remedy without need to prove causation or damages if the court finds the attorney’s conduct was a “clear and serious breach of duty” and that forfeiture of the fee (or some portion of it) is “necessary to satisfy the public’s interest in protecting the attorney-client relationship.”

Not every complaint that can be said to implicate a lawyer’s fiduciary duties is actionable separately from a negligence claim. Because a lawyer’s “standard of care in negligence claims is often defined by the characteristics of that inherent fiduciary relationship ... courts refer to the fiduciary relationship that the lawyer has to the client and use fiduciary standards to define the standard of care required of lawyers.” Consequently, “courts have most often applied those standards to conclude that the claims are really negligence, not breach-of-fiduciary-duty claims.” To distinguish independently actionable breach-of-fiduciary-duty claims against lawyers from those that sound in negligence, Texas courts have generally held that a breach-of-fiduciary-duty claim focuses on “whether an attorney obtained an improper benefit from representing the client,” while a negligence claim focuses on “whether an attorney represented a client with the requisite level of skill.” “Breach of fiduciary duty by an attorney most often involves the attorney’s failure to disclose conflicts of interest, failure to deliver funds belonging to the client, placing personal interests over the client’s interests, improper use of client confidences, taking advantage of the client’s trust, engaging in self-dealing, and making misrepresentations.”

*Id.* at 427-29 (internal citations omitted). The Texas Court of Appeals has explained some of the jurisprudential reasons for making these distinctions as follows:

Nothing is to be gained by fracturing a cause of action arising out of bad legal advice or improper representation into claims for negligence, breach of contract, fraud or some other name. If a lawyer's error or mistake is actionable, it should give rise to a cause of action for legal malpractice with one set of issues which inquire if the conduct or omission occurred, if that conduct or omission was malpractice and if so, subsequent issues on causation and damages. Nothing is to be gained in fracturing that cause of action into three or four different claims and sets of special issues.... The ultimate issue is whether there has been a breach of duty which causes damage.

*Ersek v. Davis & Davis, P.C.*, 69 S.W. 3d 268, 274–75 (Tex. App. 2002) (*pet. denied*) (quoting *Sledge v. Alsup*, 759 S.W. 2d 1, 2 (Tex. App. 1988)). The rule in Texas also serves to “prevent[ ] legal-malpractice plaintiffs from opportunistically transforming a claim that sounds only in negligence into other claims” to avail themselves of longer limitations periods, less onerous proof requirements, or other tactical advantages. *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 189 (Tex.App.-Houston [14th Dist.] 2002).

In *Rockefeller I*, the Idaho Supreme Court quoted the Texas Supreme Court's explanation of breach of fiduciary duty claims with approval. *Rockefeller*, 136 Idaho at 642, 39 P.3d at 582. The distinction the Texas courts have made between permissible and non-permissible claims for breach of a fiduciary duty arising out of the attorney-client relationship are consistent with the conclusion the Idaho Supreme Court reached in *Bishop*, as well as the rationale it expressed for why it did so. Claims traditionally brought as claims in negligence must be brought as claims for negligence, not under some other legal theory. In the absence of explicit guidance from the Idaho Supreme Court, this Court concludes it is appropriate to follow the approach used by the courts of Texas. Their approach seems consistent with the Idaho Supreme Court's language in *Bishop* and also does not conflict with the Idaho Supreme Court's holding in *Rockefeller I*.

This Court concludes Plaintiff may sue her former attorney for breach of a fiduciary duty arising out of the attorney-client relationship, just like other principals may sue their agents who owe them a fiduciary duty. The test articulated by the Idaho Supreme Court in *Rockefeller I* and in the Restatement (Third) of the Law Governing Lawyers is applicable to those claims. However, Plaintiff may not bring a claim for breach of a



fiduciary duty against her attorney if the crux of her complaint is that her attorney did not provide adequate legal representation. In that event, the Plaintiff must pursue an action for professional negligence. To pursue a claim for breach of fiduciary duty, Plaintiff's allegation must be something other than her attorney simply failed to provide competent legal services. In an action for breach of fiduciary duty, where Plaintiff is only seeking the remedy of fee disgorgement, Plaintiff must allege and prove that such breach was a clear and serious one and that forfeiture of the fee, or some portion of it, is necessary to protect the public's interest in preserving the attorney-client relationship. With this standard, the Court will examine whether Plaintiff has, or can, allege a claim upon which this Court could grant such relief.

### **III. THE COURT CONCLUDES PLAINTIFF HAS NOT ALLEGED, AND CANNOT ALLEGE, A CLAIM UPON WHICH THIS COURT CAN GRANT RELIEF.**

In her complaint, Plaintiff alleges that she hired Defendant to represent her in a divorce action. [Compl. ¶ 3]. She alleges that during the course of that representation Defendant, without her knowledge or consent, "shared attorney-client confidential information" with her husband's attorney. [Compl. ¶ 4]. She later alleges that Defendant "breached his [fiduciary] duties to [her] by, among other things, disclosing attorney client privileged communications" to her husband's attorney. [Compl ¶ 9]. Defendant argues these assertions are insufficient to state a claim upon which relief may be granted. This Court agrees.

A complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. I.R.C.P. 8(a)(2). Such statement must include a concise statement of the facts constituting the cause of action. *Clark v. Olsen*, 110 Idaho 323, 715 P.2d 993 (1986). Plaintiff's allegations are mixed assertions of fact and conclusions of law. The allegation that Defendant shared information with her husband's attorney is an assertion of fact. The argument that such information was confidential is a proposition of law. Plaintiff has failed to allege in her complaint what information it is that she claims Defendant disclosed or when and how Defendant acquired it. Therefore, this Court cannot independently determine whether her proposition that such information was "attorney-

client confidential” is correct. Similarly, Plaintiff alleges Defendant breached his fiduciary duty by “disclosing attorney client privileged communications.” The assertion that Defendant disclosed communications is an assertion of fact, albeit a vague one. The argument that those communications were privileged under I.R.E. 502 is a legal one. The Plaintiff has failed to allege what the communications were, whom they were between, or the circumstances under which she alleges those took place. Therefore, the Court cannot assess if her legal argument is correct.

Because her claim for breach of fiduciary duty rests on the proposition that Defendant disclosed information that was “confidential” and/or communications that were “privileged,” and because Plaintiff has failed to allege sufficient facts to show the information was confidential and/or the communications were privileged, Plaintiff’s complaint fails to state a cause of action upon which relief may be granted. Plaintiff is required to plead all facts necessary or essential to her claim for relief. Plaintiff cannot avoid this requirement by simply by making a legal argument in her complaint. Therefore, Defendant’s motion as to this claim must be granted.

Plaintiff makes two additional allegations: that Defendant was complicit with her husband’s attorney in securing a divorce more favorable to her husband than to her and that Defendant failed to adequately represent her by failing to fully and completely evaluate the community real property. [Compl. ¶¶ 5, 6].

Plaintiff’s allegation that Defendant failed to fully and completely evaluate the value of the community property during the divorce proceedings is clearly a claim for professional negligence. As Defendant admits she cannot show damages from this alleged failure, and damages are an essential element of a claim for professional negligence, Defendant’s motion is granted as to this claim.

This Court concludes Plaintiff’s allegation that Defendant “was complicit” with her husband’s attorney in securing a divorce more favorable to her husband than to her is also, in reality, a claim for professional negligence. Plaintiff has not alleged that Defendant profited or received some personal advantage by being “complicit” with her husband’s attorney. She does not allege, for example, that her husband’s attorney paid Defendant to talk her into a settlement that was disadvantageous to her. From her briefing on this

motion, the Court discerns that her complaint is that Defendant failed to negotiate with her husband's attorney as aggressively or as zealously as she wanted. That is a claim for professional negligence. As she admits she cannot show damages from Defendant's alleged failure, this claim must be dismissed as well.

This Court must then consider whether it should permit Plaintiff to amend her complaint to correct the deficiencies in her pleading. As to her claims that Defendant failed to properly evaluate the community real property and that Defendant failed to zealously negotiate on her behalf, Plaintiff concedes she cannot show any damage from these actions. Therefore, these claims must simply be dismissed with prejudice, as permitting her to amend her pleadings or to conduct discovery on these claims will serve no purpose.

As to her claim regarding the disclosure of confidential information and/or privileged communications, Plaintiff argues that she should be permitted to amend her complaint, although she has not filed a motion seeking leave to do so. Because both parties argued that issue in their briefing as to this motion, the Court will consider whether Plaintiff should be permitted to amend her complaint. Whether to permit such amendment is a discretionary decision for this Court.

In opposing this motion, Plaintiff has submitted a declaration by her attorney in this action. That declaration includes copies of the information/communications that she alleges Defendant disclosed to her husband's attorney during their divorce case. The information/communications are contained in an electronic mail message Plaintiff allegedly sent Defendant that Defendant then allegedly forwarded to her husband's attorney in the divorce action.

In deciding a motion to dismiss pursuant to I.R.C.P. 12(b)(6), this Court may consider information outside of the pleadings so long as it provides the parties with those procedural protections under I.R.C.P. 56 when it does so. I.R.C.P. 12(d). The parties have been granted such protections here. This Court will consider the materials submitted by Plaintiff in deciding whether to simply dismiss her claim with prejudice or whether to permit her to amend her complaint. In making that decision, this Court is required to draw reasonable inferences in favor of the Plaintiff. This Court should permit amendment of

Plaintiff's complaint unless it is clear that Plaintiff can plead no set of facts that would entitle her to relief.

The email message Plaintiff alleges she sent Defendant and that Defendant subsequently forwarded to her husband's attorney appears to have been sent after Plaintiff and her husband had engaged in mediation, but shortly before the trial in her divorce proceeding was scheduled to begin. From the contents of the communications, it appears Plaintiff and her husband signed a stipulation regarding entry of a divorce decree during either formal mediation or an informal negotiation session; however, Plaintiff subsequently filed a motion to withdraw the stipulation. Defendant, her attorney, was seeking written direction from Plaintiff on whether she wished to agree to entry of a divorce decree pursuant to the stipulation or whether she wished to attempt to withdraw the stipulation and go to trial. In that context, Plaintiff sent Defendant a lengthy email in which Plaintiff did not clearly answer that question but rather expounded at length about her feelings that Defendant did not zealously represent her during the mediation or negotiation proceedings and that Defendant had pressured her into accepting a stipulation she was not comfortable with. She discussed her feelings about certain specific items of the stipulation and her general feelings that her husband got a better deal than she wanted.

She alleges Defendant shared this email with her husband's attorney and a CPA who was present during the mediation/negotiation.

Taking these facts to be true, this Court must decide if they state a claim for breach of fiduciary duty that would warrant disgorgement of all or some of the fee Plaintiff paid Defendant for his professional services.

While this is a more difficult question than her other claims, this Court concludes this claim is still, in essence, a claim for professional negligence. As the Texas Court of Appeals stated in *Beck*:

To distinguish independently actionable breach-of-fiduciary-duty claims against lawyers from those that sound in negligence, Texas courts have generally held that a breach-of-fiduciary-duty claim focuses on "whether an attorney obtained an improper benefit from representing the client," while a negligence claim focuses on "whether an attorney represented a client with the requisite level of skill." "Breach of fiduciary duty by an attorney most often involves the attorney's failure to disclose conflicts of interest, failure

to deliver funds belonging to the client, placing personal interests over the client's interests, improper use of client confidences, taking advantage of the client's trust, engaging in self-dealing, and making misrepresentations."

*Beck*, 284 S.W. 3d at 429 (internal citations omitted). Plaintiff argues Defendant's disclosure of her email was a breach of his fiduciary duty of fidelity - to keep information he learned in the course of his representation of her confidential. She argues the disclosure embarrassed her and is damaging to the public's interest in preserving attorney-client relationships generally. Arguably, Plaintiff's allegations constitute an "improper use of client confidences." However, Plaintiff's factual allegations are distinguishable from those situations where agency law will compel a fiduciary to disgorge fees for misuse of confidential information obtained in the course of being a fiduciary. An agent is generally forbidden from using or communicating information confidentially given to him by his principal, or acquired by him during or an account of his agency, to benefit himself or third parties in competition with his principal. RESTATEMENT OF AGENCY (SECOND) § 395 (1958). The common law developed such rules to address the concern that an agent might provide his principal with wonderfully competent services, but nonetheless use his relationship with the principal to his own advantage and to the detriment of the principal. Thus, the reason the Texas courts focus on whether a plaintiff is alleging the attorney obtained an improper benefit from representing a client (breach of fiduciary duty claim) and whether the attorney represented a client with the requisite skill (professional negligence claim).

Here Plaintiff does not allege Defendant had a conflict of interest, that he stood to benefit himself by sharing her email with the other attorney, or that he lied to her in any way. She simply claims, essentially, that the rules of conduct that govern Defendant's profession precluded him from sharing her email without her permission and that he did so anyway. While Plaintiff has chosen to articulate that claim in the language of an action for breach of fiduciary duty, it is, at its essence, a claim that Defendant did not exercise the care his profession demands in handling her communications. That is a claim for professional negligence.

Given the Supreme Court's decision in *Bishop*, this Court feels compelled to reach the conclusion that Plaintiff is not entitled to allege alternative claims for breach of

fiduciary duty and for professional negligence on the same facts. In the language of the Texas rule, she may not “fracture” her claim for professional negligence into a claim for breach of fiduciary duty simply to take advantage of the remedy of fee disgorgement. Where her facts would traditionally be viewed as alleging a claim sounding in negligence, Plaintiff is required to bring her claim under that theory. Plaintiff concedes she cannot because she cannot show damages as a result of Defendant’s alleged breach of his professional duties to her. Therefore, permitting Plaintiff to amend her complaint would serve no purpose.

Accordingly, Defendant’s motion to dismiss the Complaint is GRANTED. All of Plaintiff’s claims are hereby dismissed with prejudice.

IT IS SO ORDERED.

 Signed: 3/15/2018 05:26 PM  
\_\_\_\_\_  
JONATHAN MEDEMA  
District Judge

CERTIFICATE OF MAILING

I hereby certify that on March 16th, 2018, I served a true and correct copy of the  
within instrument as follows:

Kim J. Trout  
TROUT LAW, PLLC  
3778 N. Plantation River Drive, Suite 101  
Boise, ID 83703  
Email: ktrout@trout-law.com

☐ U.S. Mail, Postage Prepaid  
☐ Interdepartmental Mail  
☒ Electronic Mail  
☐ Facsimile

Keely E. Duke  
Aubrey D. Lyon  
DUKE SCANLAN & HALL, PLLC  
1087 West River Street, Suite 300  
Boise, Idaho 83707  
Email: ked@dukescanlan.com  
adl@dukescanlan.com

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☒ Electronic Mail  
☐ Facsimile

CHRISTOPHER D. RICH  
Clerk of the District Court

Signed: 3/16/2018 07:34 AM

By: Janet Ellen  
Deputy Court Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-8744

**JUDGMENT**

JUDGMENT IS ENTERED AS FOLLOWS:

All of Plaintiff's claims against Defendant are dismissed with prejudice.

Signed: 3/23/2018 12:47 PM

  
\_\_\_\_\_  
JONATHAN MEDEMA  
District Judge



## CERTIFICATE OF SERVICE

I, Christopher D. Rich, the undersigned authority, do hereby certify that I have emailed/mailed on March 23 , 2018, one copy of the ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause as follows:

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CHRISTOPHER D. RICH  
Clerk of the District Court

Signed: 3/23/2018 01:59 PM

By: Janet Ellis  
Deputy Court Clerk



KIM J. TROUT, ISB #2468  
TROUT LAW, PLLC  
3778 N. Plantation River Dr., Ste. 101  
Boise, ID 83703  
Telephone (208) 577-5755  
Facsimile (208) 577-5756  
ktrout@trout-law.com

Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**MOTION TO AMEND  
COMPLAINT**

I.R.C.P. 15

Plaintiff Rebecca Parkinson respectfully moves this Court for permission to amend her Complaint, as more fully set out in her supporting legal brief.

See attached proposed amended complaint, "Exhibit A."

DATED April 6, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 6, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

Keely E. Duke  
[ked@dukescanlan.com](mailto:ked@dukescanlan.com)

E-file ☒

Aubrey D. Lyon  
[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

/s/ Kim J. Trout  
Kim J. Trout

# EXHIBIT A

KIM J. TROUT, ISB #2468  
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Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,  
  
Plaintiff,

vs.

JAMES E. BEVIS,  
  
Defendant.

Case No. CV01-17-08744

**FIRST AMENDED  
COMPLAINT**

Plaintiff Rebecca Parkinson complains and alleges against Defendant, as follows:

**INTRODUCTION**

1. This is a claim for breach of fiduciary duty and equitable forfeiture.
2. This is not a claim for legal malpractice, as Parkinson cannot, in good faith, plead all the necessary elements for a legal malpractice claim under applicable Idaho case law.
3. Plaintiff Rebecca Parkinson is a divorced woman residing in Ada County, Idaho.
4. Defendant James Bevis is an attorney residing and working in Ada County, Idaho.
5. This Court has jurisdiction pursuant to Idaho Code § 1-705.
6. Venue is proper in Ada County pursuant to Idaho Code § 5-404 because the defendant resides or has his principal place of business in this county.

**STATEMENT OF FACTS**

7. In July of 2014, Parkinson hired Bevis to represent her as an attorney in divorce proceedings with her now former husband, Joe Parkinson.

8. On May 11, 2015, the parties attended a mediation conference with their attorneys. The parties reached a stipulated settlement agreement during mediation.
9. On May 12, 2015, Parkinson sent Bevis an email with a subject line “I am sick to my stomach,” in which Parkinson expressed her extreme concern and dissatisfaction to Bevis about the settlement and about how she was taken advantage of therein. See attached, “Exhibit A.”
10. Parkinson then instructed Bevis to move to withdraw the stipulated agreement.
11. On May 14, 2015, Bevis sent Parkinson a letter in which Bevis acknowledges that he had filed a motion to withdraw the stipulation, but that he had also filed a motion to withdraw as counsel.
12. Notwithstanding his withdrawal motion, Bevis continued to communicate with Parkinson for purposes of pressuring her into changing her mind about the stipulated settlement.
13. Parkinson finally agreed to accept the settlement, and she communicated this fact to Bevis.
14. On Saturday, May 16, 2015, at 8:35 a.m., Parkinson’s accountant, Buck Harris, emailed Bevis and Welsh, explaining that she had talked to Parkinson that morning and that she had been busy with graduation activities and was at the time traveling back to Caldwell. Harris explained that Parkinson planned to confirm her acceptance of the settlement by email that morning.
15. On Saturday, May 16, 2015, at 8:53 p.m., Parkinson wrote a message to Harris (later forwarded to Bevis) which said: “I am willing to move forward, under the same terms as Monday.”
16. On Saturday, May 16, 2015, at 9:59 a.m., Welsh replied to Harris, “Thanks,” (apparently unaware that Parkinson had already emailed her acceptance). Then at 10:53 a.m., Bevis replied to Welsh and said, “After it arrives, I suggest U & I go to court early AM Monday and appear to have it entered.” Then at 10:55 a.m., Welsh replied to Bevis, “Agreed.”
17. On Saturday, May 16, 2015, at 2:07 p.m., Bevis emailed Parkinson and said: “I received your email confirming that you accept the stipulation signed on May 11. It should also state that you will not change your mind...I will ask the judge to enter the Decree Tuesday A.M. and he will likely ask to see the email, so please send me immediately another email with the wording I need. Welsh will probably be calling any minute so time is of the essence now.” Then at 2:19 p.m., Bevis again

emailed Parkinson and said: “Your email cannot state that you want to negotiate about other issues as that is a rejection.” Then at 2:34 p.m., Bevis again emailed Parkinson and said, “Welsh is waiting. Please respond as I asked.” Finally, at 2:56 p.m., Bevis again emailed Parkinson and said: “I have to take care of a grandchild at 3. I will be leaving in 6 minutes. I’ve been here since 10:30 waiting on a proper response from you. I don’t have email at home.”

18. Parkinson did not respond to Bevis’s additional emails, being otherwise disposed.

19. On Sunday, May 17, 2015, at 8:30 a.m., Bevis became impatient and emailed Welsh, saying: “Dear Stan: This is all I have received from Becky around 2 PM yesterday. I told you about it yesterday. I sent emails to her about it and she has not responded. I will forward them to you.” The phrase “this is all I have received from Becky” referred to Parkinson’s May 16, 8:53 a.m. acceptance email to Harris, and which Bevis then forwarded to Welsh as part of his 8:30 a.m. email.

20. On Sunday, May 17, 2015, at 8:32 a.m., Bevis forwarded to Welsh some of his emails of the previous day between 2:07 p.m. and 2:56 p.m. However, Bevis also forwarded to Welsh a full copy of Parkinson’s May 12, 2015 email with the subject line “I am sick to my stomach.”

21. On Sunday, May 17, 2015, at 11:28 a.m., Parkinson sent Harris an email, saying: “I am prepared to agree to the settlement struck Monday, May 11, 2015. I will not change my mind.”

22. On Sunday, May 17, 2015, at 11:39 a.m., Bevis forwarded Parkinson’s email to Welsh.

23. Parkinson was unaware that Bevis had sent her May 12, 2015 email to Welsh.

24. Parkinson did not authorize Bevis to send her May 12, 2015 email to Welsh.

25. Bevis did not have any reason to send Welsh a copy of Parkinson’s May 12, 2015 email, titled “I am sick to my stomach,” or his other emails to Parkinson. Bevis had already notified Welsh of Parkinson’s May 16, 2015, 8:53 a.m. acceptance email, which was sufficient for Welsh to know that Parkinson had accepted the terms of the parties’ prior settlement agreement.

26. Parkinson paid Bevis approximately \$73,500.00 for his legal services. Bevis’s disclosures to opposing counsel have significantly impaired the value of those services for Parkinson.

### **COUNT 1: BRECH OF FIDUCIARY DUTY**

27. Parkinson incorporates the above paragraphs by reference, as is fully set out herein.

28. Bevis had a duty under Idaho R. Prof. C. 1.6(a) not to reveal information relating to Parkinson's representation unless Parkinson had given informed consent.
29. Bevis breached his duty by disclosing Parkinson's private email communications to Welsh without Parkinson's informed consent.
30. Bevis's disclosure to Welsh did not meet the exceptions of Idaho R. Prof. C. 1.6(b).
31. Bevis failed to make reasonable efforts to prevent the disclosure of Parkinson's emails to Welsh; in fact, Bevis admits that he intended to disclose the emails to Welsh.
32. Bevis breached his confidentiality duties to Parkinson under the official commentary to Idaho R. Prof. C. 1.6, which state: "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients." Bevis did not take reasonable precautions to prevent Parkinson's high personal May 12, 2015 email titled "I am sick to my stomach" from coming into the hands of opposing counsel.
33. Bevis did not have good cause for disclosing Parkinson's emails to Welsh.
34. Bevis's disclosures were a clear and serious and willful violation of his duty of confidentiality.
35. Parkinson paid Bevis approximately \$73,500.00 for his legal services. Bevis's disclosures to opposing counsel have significantly impaired the value of those services for Parkinson.
36. Parkinson does not have an adequate legal remedy for Bevis's breach of confidentiality, as the breach occurred after Parkinson had renewed her agreement to settle her divorce case.
37. Bevis is entitled to the remedies of equitable forfeiture and fee disgorgement, in amounts to be proven at trial.
38. Parkinson reserves the right to amend this complaint to make additional claims against Bevis as more information becomes available through discovery, including claims for additional breaches of duty and claims for legal malpractice.

#### **ATTORNEY FEES AND COSTS**

39. Parkinson has been required to retain Trout Law to prosecute this action and has agreed to pay said attorney a reasonable attorney's fee. The Court should award the sum of \$15,000.00 as a



reasonable attorney fees should this matter be resolved by default, and any additional fees and costs as the Court deems reasonable should this matter be contested.

### **PRAYER FOR RELIEF**

Wherefore, Parkinson prays for the following relief:

1. For a judgment that Bevis must forfeit his unpaid legal, and disgorge his paid legal fees, incurred in the underlying divorce action, in amounts to be proven at trial; if the matter is resolved by default, a judgment that Bevis must forfeit all his unpaid legal fees, and disgorge all his paid legal fees, in incurred in the underlying divorce action; and,
2. For attorney fees and costs, in amounts to be proven at trial; or, if the matter is resolved by default, then for attorney fees and costs in the amount of \$15,000.00.

DATED April 6, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 6, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

Keely E. Duke  
[ked@dukesanlan.com](mailto:ked@dukesanlan.com)

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Kim J. Trout

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Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**LEGAL BRIEF IN SUPPORT OF  
MOTION TO AMEND  
COMPLAINT**

I.R.C.P. 15

Plaintiff Rebecca Parkinson respectfully submits this legal brief in support of her motion to amend her Complaint, as follows:

**INTRODUCTION**

In its memorandum decision, the Court found that Parkinson had not sufficiently alleged a claim for breach of fiduciary duty. (See *Memorandum Decision and Order Granting Defendant's Motion to Dismiss*, pp. 25-26). Specifically, the Court found: "Because her claim for breach of fiduciary duty rests on the proposition that Defendant disclosed information that was "confidential" and/or communications that were 'privileged,' and because Plaintiff has failed to allege sufficient facts to show the information was confidential and/or the communications were privileged, Plaintiff's complaint fails to state a cause of action upon which relief may be granted." (*Id.*, at p. 25). This deficiency, if true, has now been fully remedied by Parkinson's proposed amended complaint. As set out below, the Court should grant Parkinson's motion and allow her claim to proceed to trial on its merits.

## **LEGAL STANDARDS**

“The decision to grant or refuse permission to amend a complaint is left to the sound discretion of the trial court when a party proposes to amend its complaint after a responsive pleading is served...Nonetheless, as this Court indicated in *Wickstrom v. North Idaho College*, 111 Idaho 450, 725 P.2d 155 (1986), in the interest of justice, district courts should favor liberal grants of leave to amend a complaint.” *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997).

“A pleading may be amended even after judgment has been entered.” *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 546, 691 P.2d 787, 792 (Ct. App. 1984).

## **LEGAL ARGUMENTS**

### **1. Parkinson States a Claim Upon Which Relief Can be Grated:**

Parkinson’s proposed amended complaint states a breach of fiduciary duty claim upon which relief can be granted. Idaho’s pleading standards are clear—Parkinson only needs to state a viable claim; she does not have to prove or prevail on her claim right now at the risk of another Rule 12 dismissal. “The Idaho Rules of Civil Procedure set forth a system of notice pleading intended to free litigants from what were once rigid pleading requirements.” *Carrillo v. Boise Tire Co., No. 37026*, 2012 Ida. LEXIS 58, at \*24 (Mar. 1, 2012); “The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it.” *Gibson v. Ada Cty. Sheriff’s Dep’t*, 139 Idaho 5, 9, 72 P.3d 845, 849 (2003); “Pleadings serve the purpose of stating the nature of the action brought so as to put the other party on notice, and to declare the relief sought. Unlike common law pleading and code pleading, perfection is not required; imperfections are not fatal. Pleadings serve to frame the issues so that an orderly trial can ensue, and a just resolution be pursued. Lawsuits are quests for the truth and justice; trials should no longer be waged in the pleading state.” *Clark v. Olsen*, 110 Idaho 323, 328, 715 P.2d 993, 998 (Idaho Mar. 5, 1986) (concurring opinion).

Moreover, Parkinson’s proposed claim is not futile just because the amount of her eventual recovery (or, in this case, the amount of Bevis’s forfeiture or disgorgement) is indeterminate. The amount of recovery is a question of material fact—reserved for the Court or for the jury after weigh-

ing all the relevant forfeiture factors. In our case, the Court has already approved the form of Parkinson's claim: "This Court concludes Plaintiff may sue her former attorney for breach of a fiduciary duty arising out of the attorney-client relationship, just like other principals may sue their agents who owe them a fiduciary duty. The test articulated by the Idaho Supreme Court in *Rockefeller I* and in the Restatement (Third) of the Law Governing Lawyers is applicable to those claims." (*Memorandum Decision*, p. 24). Parkinson is entitled to assert her amended claim, which is modeled after these findings. Whether Parkinson gets full, partial, or no relief from her claim is immaterial at this stage of the case.

## **2. Parkinson Has Already Addressed Objections to the Form of Her Claim:**

Parkinson has already addressed Bevis's objections to the form of her claim in her *Legal Brief in Support of Motion for Reconsideration*, filed herewith—including Bevis's circular arguments that Parkinson should have brought her claim as a legal malpractice claim. To summarize, Parkinson could not have brought her breach of fiduciary duty claim as a legal malpractice claim due to her lack of actual malpractice damages. Parkinson's known injury is limited to the impaired value of her legal services from Bevis.<sup>1</sup> Parkinson is entitled to rely on the equitable forfeiture remedies set out in *Rockefeller I* and the Restatement (Third) of the Law Governing Lawyers to address the impaired value of her services. The Court should adopt and apply the holding in *Rockefeller I*, which says:

"It is the established law of this jurisdiction that an agent's right to compensation will be affected by a violation of his fiduciary duties. See, e.g., *Cooke v. Iverson*, 94 Idaho 929, 933, 500 P.2d 830, 835 (1972) (real estate agents lose their commissions for failure to disclose material facts); *Schroeder v. Rose*, 108 Idaho 707, 710, 701 P.2d 327, 330 (Ct.App.1985) (compliance with fiduciary duties is a condition precedent to collecting a commission); see also RESTATEMENT (SECOND) OF AGENCY §§ 456 and 469 (1958). Allowing an agent to retain his entire commission as a matter of law when he has breached his fiduciary duties would eviscerate agency law. Secure in his compensation from the principal as long as the assigned task is completed, an agent's only chance of loss from violating his duties would be if he harmed the principal. The higher requirement of acting in the interest of the principal, without a means of enforcement, would simply cease to exist."

*Rockefeller v. Grabow*, 136 Idaho 637, 642, 39 P.3d 577, 582 (2001) (emphasis added).

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<sup>1</sup> However, as explained in Parkinson's motion for reconsideration, Parkinson is entitled to discovery on Bevis's additional breaches prior to dismissal. It is likely that Parkinson will have evidentiary support for her other allegations of misconduct once the complete divorce file is turned over to Parkinson.

For now, Parkinson has removed any allegations which might suggest a cause of action for legal malpractice. However, Parkinson reserves the right to amend her pleadings, and to have those amendments relate back to the original filing date, should Parkinson find additional information supporting a legal malpractice claim during her discovery against Bevis.

### **CONCLUSION**

The Court should grant Parkinson's motion to amend her complaint under Idaho's liberal amendment standards. The Court should recognize Parkinson's claim as valid and should allowing the claim to proceed on its merits to trial.

DATED April 6, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 6, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,  
  
Plaintiff,

vs.

JAMES E. BEVIS,  
  
Defendant.

Case No. CV01-17-08744

**MOTION FOR  
RECONSIDERATION**

I.R.C.P. 11.2

Plaintiff Rebecca Parkinson respectfully moves this Court for reconsideration, as more fully set out in her supporting legal brief.

DATED April 6, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

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REBECCA PARKINSON,

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Case No. CV01-17-08744

**LEGAL BRIEF IN SUPPORT  
OF MOTION FOR  
RECONSIDERATION**

I.R.C.P. 11.2

Plaintiff Rebecca Parkinson respectfully submits this Legal Brief in support of her motion for reconsideration, as follows:

**INTRODUCTION**

Parkinson asks the Court to reconsider its order dismissing this case with prejudice. In its memorandum decision, the Court adopted all the right legal principles which actually support Parkinson's breach of fiduciary duty claim, viz., (1) that *Bishop* only forbids alternative claims to professional negligence claims when those claims could have (and should have) been brought as professional negligence claims; and (2), that Idaho clients can sue their attorneys for breach of fiduciary duties under *Rockefeller I* and the standards in Restatement (Third) of the Law Governing Lawyers. But then, Parkinson respectfully suggests that the Court engaged in a correctable misdirection in its subsequent use of these principles—ignoring Parkinson's current inability to pursue a professional negligence claim, and thus putting her in a position where Parkinson's recognized cause of action leaves her with no remedy at law or in equity.



As set out below, Parkinson respectfully urges the Court to reverse its dismissal order and allow the case to proceed on its merits, as described in Parkinson’s Rule 15(a) motion to amend. In the alternative, the Court should modify its order to dismiss without prejudice so that the parties can appropriately litigate the matter if/when Bevis institutes collection efforts against Parkinson for her alleged outstanding litigation debts.

### **LEGAL STANDARDS**

“The district court has no discretion on whether to entertain a motion for reconsideration...when deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered.” *Fragella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (Idaho June 21, 2012).

“A motion for reconsideration is a motion which allows the court—when new law is applied to previously presented facts, when new facts are applied to previously presented law, or any combination thereof—to reconsider the correctness of an interlocutory order.” *Johnson v. N. Idaho College*, 153 Idaho 58, 62, 278 P.3d 928, 932 (Idaho May 31, 2012).

### **LEGAL ARGUMENTS**

#### **1. Parkinson’s Breach of Duty Claim Cannot be Brought as a Negligence Claim:**

In its Memorandum Decision and Order, the Court said that “...the Supreme Court’s holding in *Bishop* seems to stand for the proposition that the Supreme Court will not permit clients in Idaho to sue their attorneys under a legal theory other than professional negligence if the client’s claim is one that could be brought in professional negligence.” (*Memorandum Decision and Order Granting Defendant’s Motion to Dismiss*, pp. 19-20). Parkinson agrees with this general proposition from *Bishop*. However, Parkinson does not agree with the Court’s unprecedented extension of the proposition, in which the Court explains: “...if a plaintiff’s claim for professional negligence and for breach of duty are identical except for the remedy being sought—actual damages v. fee disgorgement—the plaintiff may only pursue the claim for professional negligence.” (*Id.*, p. 21). This conclusion disregards the reality that some breach of fiduciary claims cannot be litigated as professional negligence claims because they lack the necessary element of damages (e.g., as in the case of

*Rockefeller I*). The Court should reconsider its decision in light of the following holdings on professional negligence damages:

“We have previously indicated, in a case dealing with legal malpractice, that, as objective proof in support of actual damages is required for recovery, the statute of limitations for a legal malpractice claim does not begin to run until the litigation forming the basis of that claim has concluded. The clear reasoning behind this decision was that the cause of action cannot arise until damages are incurred.”

*Taylor v. McNichols*, 149 Idaho 826, 843, 243 P.3d 642, 659 (2010) (emphasis added).

“In a legal malpractice case based upon negligence in handling litigation for a claimant, the measure of direct damages is the difference between the client's actual recovery and the recovery which should have been obtained but for the attorney's malpractice...At trial, [a claimant] will bear the burden of proving the existence and amount of such damages with reasonable certainty. If he fails to meet this burden, recovery may be denied.”

*Sohn v. Foley*, 125 Idaho 168, 172-73, 868 P.2d 496, 500-01 (Ct. App. 1994) (emphasis added).

“Application of the some damage rule in medical malpractice cases is in stark contrast to the application of the some damage requirement in legal malpractice cases. There does not seem to be any logical reason for treating the some damage requirement differently in medical malpractice cases than in legal malpractice cases, which require objective proof supporting the existence of some compensable damage.”

*Stuard v. Jorgenson*, 150 Idaho 701, 712, 249 P.3d 1156, 1167 (2011) (dissent) (emphasis added).

These holdings are clear—legal malpractice claims in Idaho require proof of actual, compensable damages. Here, Parkinson cannot currently bring her fiduciary claim as a legal malpractice claim because she does not have “objective proof in support of actual damages.” Bevis has refused to turn over Parkinson’s case file due to alleged non-payment of attorney fees. As it stands, Parkinson can only show that she was harmed in the form of impaired value of Bevis’s services, which is not a compensable form of legal malpractice damages in the traditional sense of legal malpractice. Parkinson anticipates that as she gets more information from Bevis’s case file, that she will be able to substantiate her prior allegations, i.e., that Bevis was complicit with Stan Welsh, and that Bevis failed to properly evaluate her property. At that point, Parkinson intends to amend her pleadings to address her potential malpractice claims. In the interim, Parkinson asks the Court to allow her to pursue her known and recognized claim of breach of fiduciary duty against Bevis for his clear and serious breach of her attorney-client confidences with opposing counsel.

Parkinson's known claim for breach of fiduciary duty is similar to the claim litigated in *Rockefeller I*. There, Mark Rockefeller breached his fiduciary duties to the Grabows as their real estate agent. Rockefeller then argued that the Grabows were not entitled to a forfeiture remedy because they had not suffered any actual damages. The Idaho Supreme Court disagreed, explaining:

"Allowing an agent to retain his entire commission as a matter of law when he has breached his fiduciary duties would eviscerate agency law. Secure in his compensation from the principal as long as the assigned task is completed, an agent's only chance of loss from violating his duties would be if he harmed the principal. The higher requirement of acting in the interest of the principal, without a means of enforcement, would simply cease to exist."

*Rockefeller v. Grabow*, 136 Idaho 637, 642, 39 P.3d 577, 582 (2001).

Thus, *Rockefeller I* gives this Court the appropriate standard for Parkinson's breach of fiduciary claim. The Court acknowledges this fact when it says: "This Court concludes Plaintiff may sue her former attorney for breach of a fiduciary duty arising out of the attorney-client relationship, just like other principals may sue their agents who owe them a fiduciary duty. The test articulated by the Idaho Supreme Court in *Rockefeller I* and in the Restatement (Third) of the Law Governing Lawyers is applicable to those claims." (*Memorandum Decision*, p. 24). The Court should reverse its dismissal order, finding that Parkinson is entitled to litigate her claim as a breach of fiduciary duty claim.

## **2. There Are Strong Policy Considerations in Favor of Reconsideration:**

In concluding that Parkinson's claim is really a legal malpractice claim, the Court has put Parkinson in an irresolvable, legal catch-22, "...a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." (See *Webster's Third New International Dictionary*, Unabridged. 2018.. Web. 02 Apr. 2018). In other words, the Court's order places Parkinson where she has no currently available remedies, in law or in equity, despite Bevis's clear violation of his ethical duties. Parkinson can't bring a legal malpractice claim due to a lack of immediate proof of actual damages, and she can't litigate her breach of fiduciary duty claim due to the Court's holdings. Unintentionally, perhaps, the Court has favorably identified the solution to Parkinson's dilemma in its memorandum decision and yet has made the solution completely inaccessible to her. The easiest way to correct this problem is for the Court to apply its first (and correct) proposition taken from the *Bishop* case, i.e., that the Court will not permit clients to sue their attorneys under a legal

theory other than professional negligence if the client's claim is one that could be brought in professional negligence. (*Memorandum Decision*, pp. 19-20). The Court can apply the inverse of this proposition to Parkinson's claim, finding that the Court should permit Parkinson to sue her attorney under a legal theory other than professional negligence because her known claim for breach of confidences is one that could not currently be brought as professional negligence. There is no need, beyond these two simple propositions, to engage in any additional remedies or damages analyses.<sup>1</sup>

There are significant, viable policy considerations in favor of reconsideration: (1) First, it gives Parkinson her day in court (Idaho judicial policy favors "the just resolution of actions by providing litigants their day in court." *Houpt v. Wells Fargo Bank, Nat'l Ass'n*, 160 Idaho 181, 188, 370 P.3d 384, 391 (2016)); (2) Second, it allows Parkinson to have her claim decided on its merits ("A 'determination' of an action within the meaning of Rule 1 is meant to be a determination of the controversy on the merits—not a termination on a procedural technicality which serves litigants not at all. A determination entails a finding of the facts and an application of the law in order to resolve the legal rights of the litigants who hope to resolve their differences in the courts." *Bunn v. Bunn*, 99 Idaho 710, 712, 587 P.2d 1245, 1247 (1978)); and (3) Third, it preserves the Court's role in giving liberal construction to Idaho pleadings ("The motion to dismiss presented under IRCP 12(b) (6), has generally been viewed with disfavor because of the possible waste of time in case of reversal of a

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<sup>1</sup> In its memorandum decision, the Court discusses the concept of legal remedies vs. "practical" remedies, explaining that: "In *Bishop*, the distinction between a claim sounding in contract and a claim sounding in negligence had a significant practical effect given the original client's death. The claim in negligence abated upon the client's death; the claim in contract did not. In *Bishop*, permitting the plaintiff to pursue alternative claims for breach of contract and professional negligence would have had the practical effect of permitting the plaintiff to pursue the breach of contract claim. Thus, while the legal remedy (compensatory damages) for each claim was the same; the practical remedies available were vastly different." (*Memorandum Decision*, pp. 20-21). But this discussion of remedies is not relevant to Parkinson's scenario. The equitable remedies in Parkinson's case are not comparable to the two alternate legal remedies in *Bishop*, i.e., legal malpractice damages and breach of contract damages. As the Court in our case acknowledges, "...if a claim can be asserted as both one for breach of contract and one for professional negligence, only the claim for professional negligence can be brought, regardless of whether that limits or eliminates any remedy." (*Id.*, p. 21) (emphasis added). The Court's repeated use of the qualifying word "if" in its memorandum distinguishes Parkinson's forfeiture claim from the alternate claim in *Bishop*. If the Court is still in doubt on this point, it should consider the pertinent holdings in *Hendry v. Pellad*, cited later in the brief: "The different treatment of compensatory damages and forfeiture of legal fees...makes sense. Compensatory damages make plaintiffs whole for the harms that they have suffered as a result of defendants' actions. Clients therefore need to prove that their attorney's breach caused them injury so that the trier of fact can determine whether they are entitled to any damages. Forfeiture of legal fees serves several different purposes. It deters attorney misconduct, a goal worth furthering regardless of whether a particular client has been harmed." *Hendry*, 315 U.S. App. D.C. 297, 73 F.3d at 402.

dismissal of the action, and because the primary objective of the law is to obtain a determination of the merits of the claim...a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Pleadings are to be liberally construed. Mere vagueness or lack of detail is not ground for a motion to dismiss.” *Wackerli v. Martindale*, 82 Idaho 400, 404, 353 P.2d 782, 784 (1960)).

To be clear—the Court has already found that Parkinson’s equitable forfeiture claim is a recognized claim under Idaho law: “This Court concludes Plaintiff may sue her former attorney for breach of a fiduciary duty arising out of the attorney-client relationship, just like other principals may sue their agents who owe them a fiduciary duty. The test articulated by the Idaho Supreme Court in *Rockefeller I* and in the Restatement (Third) of the Law Governing Lawyers is applicable to those claims.” (*Memorandum Decision*, p. 24). The flaw in logic was in adopting Bevis’s circular and incorrect arguments that the claim was still just a malpractice claim. As already established, Parkinson’s breach of confidentiality claim is not a malpractice claim because it lacks actual damages, and the only remedy available to Parkinson is equitable forfeiture remedy as seen in *Rockefeller I*. Whether Parkinson also has other, parallel claims for legal malpractice remains to be seen in discovery. The Court should reverse its determination and allow Parkinson’s breach of fiduciary duty claim to proceed on its merits. Moreover, the Court should not try and resolve the fact-intensive elements of the claim under *Rockefeller I* and the Restatement (Third) of the Law Governing Lawyers (e.g., clear and serious violation, potential for harm, timing, etc.), as those are fact issues for resolution at trial, and not under a motion to dismiss standard.

### **3. The “Crux” of Parkinson’s Complaint Was Breach of Fiduciary Duty:**

The Court said in its memorandum decision: “Plaintiff may not bring a claim for breach of a fiduciary duty against her attorney if the crux of her complaint is that her attorney did not provide adequate legal representation.” (*Memorandum Decision*, pp. 24-25). Parkinson agrees with this as general legal proposition because it mirrors the rule against duplication of claims. But the proposition does not apply here, as Parkinson could not have brought her claim as a legal malpractice claim

against Bevis. The term “crux,” as used by the Texas Court in *Beck v. Law Offices of Edwin J. Terry, Jr., P.C.*, 284 S.W.3d 416 (Tex. App. 2009), is just another way of describing the gravamen of the complaint. (“What matters is the crux—or, in legal speak, the gravamen—of the plaintiff’s complaint...” *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 132 (3d Cir. 2017)). Idaho case law defines gravamen as “...the material or significant part of a grievance or complaint.” *Stevens v. Eyer*, 161 Idaho 407, 410, 387 P.3d 75, 78 (2016). See also “Gravamen,” *Black’s Law Dictionary*, 10<sup>th</sup> ed. (2009), p. 817 (“The substantial point or essence of a claim.”). Under Idaho’s notice pleading standards, the crux or gravamen of Parkinson’s claim—her only stated claim—was clearly breach of fiduciary duty.

The Court erred by finding that Bevis’s disclosure of confidential information “...is still, in essence, a claim for professional negligence.” (*Memorandum Decision*, p. 28). This statement contradicts the Court’s earlier findings, i.e., that the Court must permit an alternate claim if the claim cannot be litigated as a malpractice claim, and that Idaho recognizes a client’s breach of fiduciary duty claim against their attorney under the *Rockefeller I* standards. The nature and timing of Bevis’s breach was such that Parkinson could not have sued him for legal malpractice, as he was then on the verge of completing Parkinson’s divorce settlement. However, Bevis was still under duties of confidentiality to Parkinson at the time of his ethical breach. Idaho Rules. P. Conduct 1.6 says: “A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent.” The official comments to the Rule explain this concept in more detail:

“A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation...this contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter... The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”

(*Id.*, Comments [2] and [3]). According to these comments, the confidentiality rule applies to all case-related client information, including any personal or embarrassing information. Here, Bevis disclosed embarrassing and emotionally damaging information to Parkinson’s husband, leaving Parkin-

son with feelings of shame and inferiority as to how she fared in divorce—something she can never live down or conceal. Thus, Bevis substantially impaired the value of his legal services to Parkinson, who had paid approximately \$73,500.00 to Bevis to zealous and faithfully represent her best interests. While Parkinson’s harm might seem unimportant to the Court, it is of the same caliber of harm suffered in *Rockefeller I*, where the Grabows received substantially complete services at the hands of their disloyal real estate agent. The Supreme Court found that such disloyalty was a basis for equitable forfeiture. Again, whether Parkinson also has legal malpractice claims against Bevis remains to be seen in discovery; the Court should allow Parkinson to proceed on her known claim for breach of fiduciary duty via Bevis’s disloyalty to her during her divorce case.

Persuasive case law supports this conclusion. For instance, the Texas Supreme Court has said that the doctrine of equitable forfeiture is not limited to cases with proof of actual damages:

“Texas courts of appeals, as well as courts in other jurisdictions and respected commentators, have also held that forfeiture is appropriate without regard to whether the breach of fiduciary duty resulted in damages. See, e.g., *Watson v. Limited Partners of WCKT, Ltd.*, 570 S.W.2d 179, 182 (Tex. Civ. App.--Austin, 1978, writ ref’d n.r.e.) (holding that limited partners may recover against general partner without a showing of actual damages); *Russell v. Truitt*, 554 S.W.2d 948, 952 (Tex. Civ. App.--Fort Worth 1977, writ ref’d n.r.e.) (holding that plaintiffs were entitled to recovery of agency fees as a matter of law if the breach of fiduciary duty was proved without regard as to whether the breach caused any harm); *Anderson v. Griffith*, 501 S.W.2d 695, 701 (Tex. Civ. App.--Fort Worth 1973, writ ref’d n.r.e.) (explaining that, even though the principal was not injured, ‘the self-interest of the agent is considered a vice which renders the transaction voidable at the election of the principal without looking into the matter further than to ascertain that the interest of the agent exists’) (quoting *Burleson v. Earnest*, 153 S.W.2d 869, 874 (Tex. Civ. App.--Amarillo 1941, writ ref’d w.o.m.)); see also *Judwin Properties, Inc. v. Griggs & Harrison, P.C.*, 911 S.W.2d 498, 507 (Tex. App.--Houston [1st Dist.] 1995, no writ) (stating in dicta that ‘when an attorney has stolen or used the interest to the detriment of his client, the plaintiff need not prove causation for breach of fiduciary duty’); *Bryant v. Lewis*, 27 S.W.2d 604, 608 (Tex. Civ. App.--Austin 1930, writ dismissed) (holding that attorney who represented clients with conflicting interests was not entitled to any compensation for legal services rendered without addressing whether actual damages were sustained).”

(*Burrow v. Arce*, 997 S.W.2d 229, 239 n.35 (Tex. 1999)). See also, *Hendry v. Pelland*, 315 U.S. App. D.C. 297, 73 F.3d 397, 402 (D.C. Cir. 1996) (“Under District of Columbia law, clients suing their attorney for breach of the fiduciary duty of loyalty and seeking disgorgement of legal fees as their sole remedy need prove only that their attorney breached that duty, not that the breach caused them injury.”).

Next, the Third Circuit Court of Appeals confirms that the Texas rule in *Burrow v. Arce* is consistent with the Restatement Second on Agency § 469 (2010), as cited by the Court in *Rockefeller I*:

“Under Texas law, a client need not prove actual damages in order to obtain forfeiture of an attorney’s fee for the attorney’s breach of fiduciary duty to the client. *Burrow v. Arce*, 997 S.W.2d 229, 240, 42 Tex. Sup. Ct. J. 932 (Tex. 1999). See *Yaquinto v. Sergerstrom*, (In re Segerstrom, 247 F.3d 218, 226 n.5 (5th Cir. 2001)). The Texas rule accords with the rule adopted in several other states, the Restatement (Second) of Trusts § 243, the Restatement (Second) of Agency § 469, and the Restatement (Third) of the Law Governing Lawyers, §§ 37, 55. It also comports with the two circuit level decisions on the issue, *Hendry v. Pelland*, 315 U.S. App. D.C. 297, 73 F.3d 397 (D.C. Cir. 1996) (applying D.C. law), *Frank v. Bloom*, 634 F.2d 1245, 1257-58 (10th Cir. 1980) (applying Kansas law).”

(*Huber v. Taylor*, 469 F.3d 67, 77 (3d Cir. 2006)).

Finally, the Ninth Circuit Court of Appeals explains that an attorney’s ethical violations, such as Bevis’s violations, are sufficient for the attorney to forfeit or disgorge his or her fees:

“In sum, under long-standing equitable principles, a district court has broad discretion to deny fees to an attorney who commits an ethical violation. In making such a ruling, the district court may consider the extent of the misconduct, including its gravity, timing, willfulness, and effect on the various services performed by the lawyer, and other threatened or actual harm to the client. See Restatement (Third) of Law Governing Lawyers § 37 (2000).”

(*Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012)).

See also, *Eriks v. Denver*, 118 Wash. 2d 451, 462, 824 P.2d 1207, 1213 (1992) (“The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized.”); *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982) (“This court has repeatedly stated that an attorney (or any fiduciary) who breaches his duty to his client forfeits his right to compensation...the law has traditionally been unyielding in its assessment of penalties when a fiduciary, or trustee, or agent has breached any of his obligations. The underlying policy is a strong one. It recognizes that insuring absolute fidelity to the principal’s (or beneficiary’s) interests is fundamental to establishing the trust necessary to the proper functioning of these relationships.”).

#### **4. The Court Should Allow Parkinson the Opportunity to Amend Her Pleadings:**

To the extent the “crux,” or gravamen, of Parkinson’s was not made clear in her original complaint—a point which Parkinson strongly disputes—Parkinson has filed an amended complaint



herewith so that the gravamen cannot possibly be misconstrued again. This amended complaint is sufficient to overcome the arguments in Bevis's Rule 12 motion to dismiss. Idaho case law says:

"Pleadings serve the purpose of stating the nature of the action brought so as to put the other party on notice, and to declare the relief sought. Unlike common law pleading and code pleading, perfection is not required; imperfections are not fatal. Pleadings serve to frame the issues so that an orderly trial can ensue, and a just resolution be pursued. Lawsuits are quests for the truth and justice; trials should no longer be waged in the pleading state."

*Clark v. Olsen*, 110 Idaho 323, 328, 715 P.2d 993, 998 (Idaho Mar. 5, 1986) (concurring opinion);

"A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief."

*Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Idaho Ct. App. 1992)

"A defense of new matter does not deny any facts; it assumes the averments of the complaint to be true, and by an express or silent admission admits the truth of the complaint, as far as it goes."

*Smith v. Marley*, 39 Idaho 779, 780, 230 P. 769, 769, 1924 Ida. LEXIS 98, \*1 (Idaho 1924). Here, Bevis's Rule 12 motion must be denied because it cannot defeat Parkinson's claim for breach of fiduciary duty while at the same time assuming the truth of Parkinson's allegations. See *State v. Peregrina*, 151 Idaho 538, 550, 261 P.3d 815, 827, 2011 Ida. LEXIS 129, \*42 (Idaho 2011). As seen in the amended complaint, Parkinson's allegations, taken as true, clearly entitle her to forfeiture and/or disgorgement remedies under *Rockefeller I* and the Restatement (Third) of the Law Governing Lawyers.

## **5. The Court Should Reopen this Case to Allow For Discovery:**

The Court should reopen this case to allow Parkinson to conduct Discovery. Parkinson's allegations are as complete as the circumstances permit. Her allegations (including any potential malpractice allegations) require access to divorce case file, which is still in Bevis's exclusive control. Parkinson has good grounds to believe that Bevis has withheld documents and communications. On August 18, 2015, Parkinson's current legal counsel, Kim Trout, asked Bevis for his complete correspondence file re: the Parkinson's divorce. On December 7, 2015, Bevis responded by disclosing only a single email to Mr. Trout. Bevis later sent additional emails to Parkinson. However, Bevis has

still only disclosed select emails from May 12, 2015 to May 17, 2015; he has not disclosed any other communications from the divorce case. (See *Declaration of Kim J. Trout*, ¶ 2-5, filed herewith).

There are three additional reasons the Court should permit discovery: (1) it is allowed under Rule 26(b)'s broad discovery standards; (2) it is allowed under Rule 11(b)'s flexible signature standards; and (3) it is required under Rule 12(b) dismissal standards. First, the Court should permit discovery under Rule 26(b)(1)(A)'s broad discovery standards, which allows for discovery of "...any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Parkinson has alleged a breach of fiduciary duty claim against Bevis based on Bevis's breach of her confidences. Parkinson is entitled to conduct discovery as to additional breaches so as to fully prepare and argue the merits of her forfeiture claims under the *Rockefeller I* standards. Second, the Court should permit discovery under Rule 11(b)(3)'s flexible signature standards, which allow parties to make claims that will "...likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Parkinson has already shown at least one clear and serious breach of her confidences. It is likely that her allegations of additional breaches will have evidentiary support after reviewing the complete divorce case file. Third, the Court should permit discovery under Rule 12(b) dismissal standards. Idaho case law says: "A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Idaho Ct. App. 1992) (emphasis added). Presently, the Court cannot make this Rule 12 determination because Bevis has exclusive control of Parkinson's full divorce file, and it's not clear that Parkinson can prove "no set of facts" to better support her claim once she has the case file. It is bad faith, and extremely disingenuous, for Bevis to withhold the file and then to ask for dismissal based on Parkinson's lack of supporting allegations. The Court should remedy this situation by reopening the case to permit discovery—recognizing that Parkinson has already alleged a claim for breach of fiduciary duty which, if proven, would entitle her to some relief under Idaho forfeiture law.

## **6. In the Alternative, the Court Should Dismiss this Case Without Prejudice:**

In the alternative, the Court should only dismiss this case without prejudice. This is a relatively novel question under Idaho remedies law, and it is sure to come up again once Bevis starts his collections against Parkinson. Even if the statute of limitations for Parkinson's claim has expired at that point, Parkinson will still be able to litigate her forfeiture claim as an affirmative defense and offset to Bevis's collections. Idaho case law explains: "An expired statute of limitation does not bar a counterclaim interposed defensively as an offset against a complaint arising from the same incident." *Viehweg v. Thompson*, 103 Idaho 265, 268, 647 P.2d 311, 314 (Ct. App. 1982). Here, Bevis's future collections against Parkinson will be based on the value of his legal services to Parkinson. The Court should leave Parkinson at liberty to challenge the value of those services, and to seek forfeiture and/or disgorgement, as did the Grabows in *Rockefeller I*. In any future litigation context, there will be no danger of confusing Parkinson's claims for a legal malpractice dispute, as the factual basis in Bevis's collection pleadings will inherently rule out that possibility. If the Court finds that dismissal is still proper, notwithstanding the preceding arguments, it should dismiss this case without prejudice so that Parkinson has a future opportunity to litigate her claim as an offset to Bevis's collections.

## **CONCLUSION**

The Court should reconsider its prior dismissal order and reinstate this case for proceedings on the merits. In the alternative, the Court should dismiss the case without prejudice so that Parkinson may preserve her claim as a viable defense to Bevis's future collections.

DATED April 6, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout

Kim J. Trout  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 6, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

Keely E. Duke  
[ked@dukescanlan.com](mailto:ked@dukescanlan.com)

E-file ☒

Aubrey D. Lyon  
[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

/s/ Kim J. Trout  
Kim J. Trout

KIM J. TROUT, ISB #2468  
TROUT LAW, PLLC  
3778 N. Plantation River Dr., Ste. 101  
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Telephone (208) 577-5755  
Facsimile (208) 577-5756  
ktrout@trout-law.com

Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,  
  
Plaintiff,

vs.

JAMES E. BEVIS,  
  
Defendant.

Case No. CV01-17-08744

**DECLARATION OF KIM J. TROUT**

I.R.C.P. 12

Pursuant to Idaho Code § 9-1406 and I.R.C.P. 2.7, I declare the following is true and correct and submit the following declaration:

1. I am counsel for the Plaintiff in this matter and have personal knowledge of the facts stated herein.
2. On August 18, 2015 I sent correspondence to Mr. Bevis, the Defendant in this matter, asking for his production of his correspondence file in the *Parkinson v. Parkinson* divorce matter pending in Ada County, at that time. Said request included all email correspondence and internal correspondence regarding the *Parkinson v. Parkinson* matter.
3. On August 28, 2015, Mr. Bevis responded to my letter advising he had not destroyed any files and that he intends to make a 10-day demand, pursuant to Idaho Code § 12-120, on Ms. Parkinson. However, he does not produce his correspondence file at that time.
4. On December 7, 2015, Mr. Bevis produced a single email to my office.

5. On December 21, 2015, Mr. Bevis sent correspondence to Becky Parkinson, which correspondence was filed with the Court attached as Exhibit A to my declaration filed on January 30, 2018. Mr. Bevis provided emails for a limited period of time, from May 12 through May 17, 2015. In that correspondence produced by Mr. Bevis, Mr. Bevis discloses that he forwarded correspondence between Ms. Parkinson and Mr. Bevis to Stanley W. Welsh. This communication is clearly protected by the attorney-client privilege, as it is correspondence between counsel and client.

I declare under the penalty of perjury and pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED April 6, 2018.

/s/ Kim J. Trout  
Kim J. Trout

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 6, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

Keely E. Duke  
[kcd@dukescanlan.com](mailto:kcd@dukescanlan.com)

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/s/ Kim J. Trout  
Kim J. Trout

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*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**DEFENDANT JAMES A. BEVIS'S  
MOTION FOR FEES AND COSTS**

COMES NOW defendant James A. Bevis (erroneously named "James E. Bevis"), by and through his counsel of record, Duke Scanlan & Hall PLLC, and respectfully moves this Court to award costs and attorney fees pursuant to Idaho Rules of Civil Procedure 54(d) and 54(e) and Idaho Code section 12-121.

This Motion is based on the pleadings and papers on file in this matter and Defendant's Verified Memorandum of Costs and Fees and the Declaration of Counsel in Support filed contemporaneously herewith.

**ORAL ARGUMENT IS REQUESTED.**

DATED this 6<sup>th</sup> day of April, 2018.

DUKE SCANLAN & HALL, PLLC

By /s/ Keely E. Duke

Keely E. Duke – Of the Firm

Aubrey D. Lyon – Of the Firm

*Attorneys for Defendant James A. Bevis*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6<sup>th</sup> day of April, 2018, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

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/s/ Keely E. Duke

Keely E. Duke

Aubrey D. Lyon



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*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**DEFENDANT'S VERIFIED  
MEMORANDUM OF COSTS AND  
FEES**

COMES NOW Defendant James A. Bevis (erroneously named "James E. Bevis"), by and through its counsel of record, Duke Scanlan & Hall PLLC, and submits this Verified Memorandum of Costs and Fees. This Memorandum is supported by the Declaration of Counsel in Support filed contemporaneously herewith. This Memorandum is filed pursuant to Idaho Rule of Civil Procedure 54(d)(4).

## **I. INTRODUCTION AND PROCEDURAL BACKGROUND**

Plaintiff Rebecca Parkinson filed the Complaint in this matter on May 10, 2017. Process was not served until six months later, on November 10, 2017. (Aff. Of Service, Nov. 10, 2017.) Ms. Parkinson's Complaint included a single cause of action for "Breach of Fiduciary Duty" even though Ms. Parkinson was suing her former attorney, Mr. Bevis, for alleged malpractice committed in the course of Mr. Bevis's representation of Ms. Parkinson. (Compl. at 2.)

Mr. Bevis moved to dismiss the Complaint for failure to state a claim, which this Court granted with prejudice. (Mem. Decision and Order, Mar. 16, 2018.) Mr. Bevis incurred attorney fees and costs in defending against this action, and as the prevailing party, he respectfully requests that he be awarded those fees and costs.

## **II. COSTS AND FEES**

### **A. Mr. Bevis is the prevailing party**

A prevailing party is entitled to recover certain costs. To determine a prevailing party, I.R.C.P. 54(d)(1)(B) provides:

In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

"A determination on prevailing parties is committed to the discretion of the trial court and we review the determination on an abuse of discretion standard." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718–19, 117 P.3d 130, 132–33 (2005).

In this case, Mr. Bevis is unequivocally the prevailing party. Ms. Parkinson raised a single cause of action against Mr. Bevis, and that cause of action was dismissed upon Mr.

Bevis's motion to dismiss for failure to state a claim. For Mr. Bevis, it was "the most favorable outcome that could possibly be achieved," and he is the prevailing party. *See Eighteen Mile Ranch*, 141 Idaho at 719, 117 P.3d at 133.

**B. Costs as a Matter of Right**

Costs are allowed as a matter of right to the prevailing party unless otherwise ordered by the court. I.R.C.P. 54(d)(1)(A). "When costs are awarded to a party, that party is entitled to the following costs, actually paid, as a matter of right: (i) court filing fees, including any fees incidental to electronic filing . . . ." I.R.C.P. 54(d)(1)(C). Here, Mr. Bevis is entitled to the following costs as a matter of right:

<i>Date</i>	<i>Description</i>	<i>Amount</i>
11/17/2017	First Appearance Fee and associated processing charge	\$140.08
TOTAL		\$140.08

**C. Discretionary Costs**

Mr. Bevis also seeks his discretionary costs in this matter. "Additional items of cost not enumerated in, or in an amount in excess of that listed in subpart (C), may be allowed on a showing that the costs were necessary and exceptional costs, reasonably incurred, and should in the interest of justice be assessed against the adverse party." I.R.C.P. 54(d)(1)(D). "A court may evaluate whether costs are exceptional within the context of the nature of case." *City of McCall v. Seubert*, 142 Idaho 580, 588, 130 P.3d 1118, 1126 (2006). "Discretionary costs may include long distance phone calls, **photocopying**, faxes, travel expenses and additional costs for expert witnesses." *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005) (emphasis added; internal quotation omitted).

Here, Mr. Bevis seeks copying charges as discretionary costs. Ms. Parkinson's allegations in her Complaint were broad, and included an allegation that Mr. Bevis improperly

shared attorney-client communications, that through collusion he secured a divorce that was more favorable to Ms. Parkinson's ex-husband than herself, and that he failed to fully and adequately represent Ms. Parkinson, which included an allegation that he did not seek an evaluation of the true value of the community real property held by the Parkinson community. (Compl. ¶¶ 4-6.) Considering these allegations, Mr. Bevis's counsel copied Mr. Bevis's entire file in the underlying action in preparation for the defense of this matter. The Parkinson marital community included several parcels of real property in addition to substantial assets. Valuation of those assets was a primary issue in the underlying divorce matter, and reports and other documents related to valuation comprised a large portion of Mr. Bevis's file. If this case had proceeded to discovery, a detailed analysis of nearly every aspect of the underlying divorce action would have been necessary to defend against the allegations of impropriety, and it was necessary for counsel to obtain a complete copy of Mr. Bevis's file to prepare the defense. Mr. Bevis's counsel had small additional copying charges.

Mr. Bevis's discretionary costs are below:

<i>Date</i>	<i>Description</i>	<i>Amount</i>
11/17/2017	Copying charges (to copy 4,378-pages of client file)	\$437.80
1/31/2018	Copying charges (in connection with preparation of Reply in Support of Motion to Dismiss)	\$1.40
2/28/2018	Copying charges	\$14.00
TOTAL		\$453.20

**D. Attorney Fees**

***1. Mr. Bevis is entitled to recover attorney fees incurred in this matter***

In any civil action, attorney fees may be awarded to the prevailing party "when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." Idaho Code § 12-121. "An award of attorney fees pursuant to I.C. § 12-121 and

I.R.C.P. 54(e)(1) will not be disturbed absent an abuse of discretion.” *Idaho Military Historical Soc’y, Inc. v. Maslen*, 156 Idaho 624, 629, 329 P.3d 1072, 1077 (2014) (analyzing former Idaho Code § 12-121). The existence of a single triable issue of fact no longer prevents an award under Idaho Code section 12-121, and a trial court may apportion fees for those elements of a case that were frivolous, unreasonable, and without foundation. *Idaho Military Historical Soc’y*, 156 Idaho at 632, 329 P.3d at 1080 (“Apportionment of attorney fees is appropriate for those elements of the case that were frivolous, unreasonable, and without foundation.”) Findings that a case was pursued frivolously, unreasonably or without foundation “must be in writing and include the basis and reasons for the award.” I.R.C.P. 54(e)(2).

Here, Ms. Parkinson’s pursuit of this case was frivolous, unreasonable, and without foundation. Ms. Parkinson pursued an action for breach of fiduciary duty, which she vigorously argued was distinct from an action for legal malpractice. (Plf.’s Response to Mot. To Dismiss at 2.) The Idaho Supreme Court has held that, where a former client is suing her former attorney for alleged professional negligence in connection with the attorney’s representation of the client, the appropriate cause of action is for legal professional negligence. *See Bishop v. Owens*, 152 Idaho 616, 621, 272 P.3d 1247, 1252 (2012). Ms. Parkinson did not address *Bishop* or other cases Mr. Bevis cited regarding the appropriate cause of action against an attorney for an alleged breach of the professional standard of care in the course of an attorney’s duties to a client. Ms. Parkinson conceded that she could not prove a cause of action for legal professional negligence because she could not prove that the alleged breached caused any damages. (Plf.’s Response to Mot. To Dismiss at 6.) Additionally, Ms. Parkinson offered no Idaho authority supporting her contention that her case qualified for an exception to the general rule provided by the Idaho Supreme Court in *Bishop*: “that plaintiffs whose claims ‘traditionally’ have been treated as claims for legal

professional negligence may not alternatively allege relief under some other legal theory based on the same facts.” (Mem. Decision and Order Re. Def.’s Mot. To Dismiss at 17.) Because Ms. Parkinson did not have a good faith basis to pursue the action she pursued, Mr. Bevis respectfully requests that this Court grant him his reasonable attorney fees incurred in defending against the action.

**2.     *The Rule 54(e)(3) factors support an award of the fees incurred***

Rule 54(e)(3) provides 12 factors the Court must consider in determining an award of attorney fees. “Attorney fees, when allowable by statute or contract, are costs in an action and processed in the same manner as other costs and included in the memorandum of costs. A claim for attorney fees as costs must be supported by an affidavit of the attorney stating the basis and method of computation.” I.R.C.P. 54(e)(5). As detailed in the Declaration of Keely E. Duke filed herewith, Mr. Bevis incurred a reasonable amount in attorney fees in this matter which he seeks to recover in the amount of \$17,863.20. Each Rule 54(e)(3) factor is discussed below.

**a.     The time and labor required.** This legal malpractice matter was complicated because of Ms. Parkinson’s inconsistent and unorthodox approach. Initially, Ms. Parkinson alleged that she was seeking to recover on a host of alleged misconduct that appeared to encompass the entire divorce matter in which Mr. Bevis represented Ms. Parkinson. (Compl. ¶¶ 4-6.) Ms. Parkinson also appeared to be attempting to expand the statute of limitations by pleading a “breach of fiduciary duty” cause of action. Mr. Bevis’s counsel, Duke Scanlan & Hall, PLLC, addressed the broad allegations and the curious cause of action through a Motion to Dismiss. Duke Scanlan & Hall also prepared for Mr. Bevis’s defense by obtaining, copying, and analyzing Mr. Bevis’s file in the underlying divorce matter. (Duke Decl. Ex. B.) Ms. Parkinson took a different turn in her response to the Motion to Dismiss and contradicted the allegations in

her Complaint. (Plf.'s Response to Mot. To Dismiss at 6.) Mr. Bevis's counsel then had to research the novel approach from Ms. Parkinson's response and perform additional research and analysis in connection with that. (*See* Duke Decl. Ex. B.) Overall, Mr. Bevis's counsel approached this defense in the most efficient manner possible, but it nonetheless required substantial resources.

**b. The novelty and difficulty of the questions.** As noted above, Duke Scanlan & Hall thoroughly researched and briefed multiple theories in connection with Ms. Parkinson's Complaint and positions she took in connection with the Motion to Dismiss, including statute of limitations issues, breach of fiduciary duty in principal-agent relationships, and legal malpractice issues. Given the nature, number, and novelty of the issues, the breadth of Ms. Parkinson's allegations, and the amount at stake, the hours and fees expended on research, analysis, and briefing were reasonable.

**c. The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.** Ms. Duke, the lead counsel on this case, has nearly 20 years of civil litigation experience, and much of her career has been spent defending professionals. (Duke Decl. ¶ 2.) Where feasible and appropriate, substantial work was delegated to an associate attorney and paralegal at lower billing rates. (*See* Duke Decl. ¶ 3.)

**d. The prevailing charges for like work.** Ms. Duke has extensive experience with civil litigation and professional liability defense. (Duke Decl. ¶ 2.) She and her colleagues who worked on this matter each billed at their usual and customary rates. (Duke Decl.) The hourly rates charged by Ms. Duke and her firm are commensurate with the prevailing rates in Boise for like work. (Duke Decl. ¶ 6.)

**e. Whether the fee is fixed or contingent.** Attorneys' fees in this matter were charged on an hourly basis. (Duke Decl. ¶ 4.)

**f. The time limitations imposed by the client or the circumstances of the case.** There were no unusual time limitations. Counsel performed the necessary work as efficiently as possible, without compromising the quality of the legal services.

**g. The amount involved and the results obtained.** Mr. Bevis obtained unqualified success, obtaining dismissal for failure to state a claim. Ms. Parkinson never clearly articulated her alleged damages, but they appeared to be in the hundreds of thousands of dollars.

**h. The undesirability of the case.** This factor is neutral as this case was neither particularly desirable or undesirable.

**i. The nature and length of the professional relationship with the client.** This was the first case where Duke Scanlan & Hall has represented Mr. Bevis.

**j. Awards in similar cases.** This factor is difficult to assess given that the awards in legal malpractice cases vary according to each fact pattern. In general, the total fees in this case are within a reasonable range based on the significant allegations against Mr. Bevis and the legal work necessary to defend against those allegations.

**k. The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.** Duke Scanlan & Hall does not charge clients for the costs associated with computerized legal research, and accordingly, the attorney fees Mr. Bevis seeks to recover do not include costs for computerized legal research.

**l. Any other factor which the court deems appropriate in the particular case.** As a final factor for the Court's consideration, Ms. Parkinson did not explore pre-litigation



dispute resolution. While there is no requirement that she do so, her approach here, in alleging fault with a broad range of conduct (*see* Compl. ¶¶ 4-6) even though the ultimate intended gravamen of her claim, as later displayed in her arguments regarding Mr. Bevis's Motion to Dismiss, was much narrower. (*See* Plf.'s Response to Mot. To Dismiss at 6.) Mr. Bevis's defense, therefore, did not benefit from knowing the narrow scope of Ms. Parkinson's complaints until late in the process, in fact, just days before the hearing on Mr. Bevis's Motion to Dismiss, when a substantial portion of the costs and fees had been incurred. Ms. Parkinson's litigation strategy caused greater defense costs than a more transparent approach would have created.

### **III. CONCLUSION**

For the reasons set forth herein, Mr. Bevis respectfully requests that, pursuant to Rules 54(d)(1) and 54(e) of the Idaho Rules of Civil Procedure and Idaho Code section 12-121, this Court grant Mr. Bevis his costs and fees as follows:

- A. Costs as a matter of right: \$140.08
- B. Discretionary costs: \$453.20
- C. Reasonable attorney fees: \$17,863.20

Total: \$18,456.48

Mr. Bevis reserves the right to amend or otherwise supplement this Verified Memorandum of Costs and Fees.

DATED this 6<sup>th</sup> day of April, 2018.

DUKE SCANLAN & HALL, PLLC

By /s/ Keely E. Duke  
Keely E. Duke – Of the Firm  
Aubrey D. Lyon – Of the Firm  
*Attorneys for Defendant James A. Bevis*

### **VERIFICATION**

I, Keely E. Duke, declare under penalty of perjury pursuant to the laws of the state of Idaho as follows:

I am one of the attorneys representing defendant James A. Bevis in the above-entitled action and, as such, I have knowledge of the cost and fee amounts itemized in the foregoing Verified Memorandum of Costs and Fees.

I have reviewed the foregoing Verified Memorandum of Costs and Fees. To the best of my knowledge and belief, the costs incurred herein are true and correct and were reasonably and necessarily incurred in the defense of this action. To the best of my knowledge and belief, the costs incurred herein are in compliance with Rule 54(d) of the Idaho Rules of Civil Procedure.

DATED this 6<sup>th</sup> of April, 2018.

/s/ Keely E. Duke  
Keely E. Duke

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6<sup>th</sup> day of April, 2018, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Kim J. Trout  
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Telephone (208) 577-5755  
*Attorneys for Plaintiff Rebecca Parkinson*

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/s/ Keely E. Duke

Keely E. Duke

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*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**DECLARATION OF KEELY E. DUKE  
IN SUPPORT OF DEFENDANT  
JAMES A. BEVIS'S MOTION FOR  
FEES AND COSTS**

Keely E. Duke declares and affirms as follows pursuant to Idaho Code section 9-1406:

1. I am an attorney with the firm Duke Scanlan & Hall, PLLC ("Duke Scanlan & Hall"), counsel of record for Defendant James A. Bevis in this matter and have personal knowledge of the facts set forth herein.

2. I have handled numerous professional liability matters over the years. I am an experienced civil litigator, practicing litigation and trial work in Boise, Idaho since 1999. I hold an "AV" rating with Martindale-Hubbell, and since 2009 I have been selected by my peers to be

**DECLARATION OF KEELY E. DUKE IN SUPPORT OF DEFENDANT JAMES A. BEVIS'S MOTION  
FOR FEES AND COSTS - 1**

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included in The Best Lawyers in America. I have also been included in “Chambers USA America’s Leading Lawyers for Business.” Attached as Exhibit A and incorporated herein by reference is a copy of my professional biography.

3. Two other members of Duke Scanlan & Hall also assisted in this litigation performing different, complementary tasks and avoiding duplication. Aubrey D. Lyon, an associate attorney, performed research, prepared briefs, and performed other tasks as detailed in Exhibit B. Jennifer L. Schwartz, a contract paralegal, performed document review and other paralegal tasks as detailed in Exhibit B.

4. Duke Scanlan & Hall’s agreement for defending this case was on an hourly basis. For the time period being claimed with respect to Duke Scanlan & Hall’s legal fees incurred in this action, Duke Scanlan & Hall was compensated at the following fixed hourly rates:

- a. \$225.00 per hour for legal services performed by myself (19 years of experience);
- b. \$180.00 per hour for legal services performed by associate Aubrey D. Lyon (8 years of experience); and
- c. \$108.00 per hour for legal services performed by paralegal Jennifer L. Schwartz.

5. Attached hereto as Exhibit B and incorporated herein by reference is a true and correct copy of a summary of billing statements generated by my firm’s billing software reflecting activities performed by Duke Scanlan & Hall in this matter. As set forth in the summary of billing statements, Mr. Bevis incurred \$17,863.20 in attorney fees between November 13, 2017 and March 26, 2018. Attorneys and paralegals who billed to this matter, as reflected in the summary of billing statements, are as follows: Keely E. Duke (Shareholder,

identified as “KED”); Aubrey D. Lyon (Associate, identified as “ADL”); and Jennifer L. Schwartz (Paralegal, identified as “JLS”). I have examined the billing statements and summary and, based upon my personal knowledge, the summary of billing statements sets forth a true and accurate itemization of the fees for time expended by attorneys and paralegals from November 2017 through March 2018. The attorney fees were reasonably and necessarily incurred by Mr. Bevis in litigating this action.

6. I have knowledge of attorney and paralegal fees charged by attorneys practicing in professional liability defense in Idaho. Based upon my 19 years of experience as a litigator practicing in Idaho and upon my knowledge of attorney and paralegal fees charged by litigation firms in Idaho, I believe that Duke Scanlan & Hall’s attorneys and paralegals reasonably and necessarily expended the total of 111.50 hours in providing legal services for defense of this action, and that the total sum of \$17,863.20 incurred for those services is a fair and reasonable amount to award Mr. Bevis, as the prevailing party, for attorney and paralegal fees incurred by Duke Scanlan & Hall in defending this action and for the work described above and on the attached spreadsheet. Moreover, based upon my experience and knowledge of rates charged in the Boise, Idaho area from 2017 to the present, the rates charged by my firm are lower than the rates for comparable services performed in Boise, Idaho, and are reasonable for the work performed and the results obtained. I believe the time and labor expended to represent Mr. Bevis in this action have been reasonable and consistent with the skills required for the defense of this action, given the claims asserted by Plaintiff Rebecca Parkinson. The services of experienced litigation attorneys who were familiar with this action, as well as paralegal support, were necessary to properly prepare Mr. Bevis’s defense and to successfully seek a favorable outcome in this matter.

7. Also reflected in Exhibit B and incorporated herein by reference is a true and correct copy of data showing costs incurred in this action. As set forth in Exhibit B, Mr. Bevis incurred costs as a matter of right in the amount of \$140.08 and discretionary costs in the total amount of \$453.20 from November 2017 through March 2018. The costs identified above include filing fees and copying expenses. It is the standard practice of lawyers in Boise to separately charge clients for these expenses. The categories of costs incurred are as follows:

- a. Filing fee and associated processing charge: \$140.08
- b. Copying: \$453.20
- c. Total Costs: \$593.28

8. Each of the above costs was reasonably and necessarily incurred by Mr. Bevis in defending this action.

9. We have included in our motion for attorneys' fees only fees relating to our efforts directly involved in litigating the case. Further, we have not included in our petition the fees expended in preparing this fee petition.

10. All of the forgoing fees and costs were reasonably and necessarily incurred by Mr. Bevis in litigating this action.

11. I swear under penalty of perjury pursuant to the laws of the State of Idaho that the foregoing is true and correct.

DATED this 6<sup>th</sup> day of April, 2018.

/s/ Keely E. Duke  
Keely E. Duke

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6<sup>th</sup> day of April, 2018, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

Kim J. Trout  
TROUT LAW, PLLC  
3778 N. Plantation River Drive, Suite 101  
Boise, ID 83703  
Telephone (208) 577-5755  
*Attorneys for Plaintiff Rebecca Parkinson*

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
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☒ iCourt/Email  
[ktrout@trout-law.com](mailto:ktrout@trout-law.com)

/s/ Keely E. Duke

Keely E. Duke

Aubrey D. Lyon



# Exhibit A



---

## Keely E. Duke

### Member Attorney

1087 W River Street, Suite 300  
P.O. Box 7387  
Boise, ID 83707  
Tel. 208.342.3310  
Fax. 208.342.3299

[ked@dukescanlan.com](mailto:ked@dukescanlan.com)



### Keely Duke: Experienced, dedicated Idaho trial attorney

Keely Duke is one of Idaho's elite trial lawyers and has dedicated her career in the law to defending companies, employers, and individuals in complex business litigation and in medical malpractice, legal malpractice, employment, insurance bad faith, and product liability/medical device litigation.

Ms. Duke has participated in a number of appeals before the Idaho Supreme Court and the Ninth Circuit Court of Appeals. She has also served as an arbitrator in a wrongful death case.

Ms. Duke holds an "AV" rating with Martindale-Hubbell and since 2009 has been selected by her peers to be included in The Best Lawyers in America in two categories, Medical Malpractice Litigation and Personal Injury Litigation. She has also been included in "Chambers USA America's Leading Lawyers for Business" and is praised in that publication for her "sheer hard work, great organization, diligence and determination to fight tooth and nail for her clients."

She is a founder of Duke Scanlan & Hall.

### Awards and Honors

- AV rated in Martindale-Hubbell Judicial and Attorney Editions
- Best Lawyer of the year, medical malpractice (Boise, 2014-2015)
- Named Lawyer of the year for Boise medical malpractice defense (2014-2015)
- Idaho Business Review "Women of the Year" Honoree (2013)
- The Best Lawyers in America, medical malpractice and personal injury (2009 to present)
- Chambers USA – Named as a leading lawyer in commercial litigation (2009 to present)
- Named in Who's Who Among Executives and Professionals (2009 to present)
- Mountain States Super Lawyers "Rising Star" (2008 to present)

- 2008 TWIN Honoree – Awarded to women who have excelled in their fields and made significant contributions to industry in executive, managerial and professional roles
- Form Editor, Willamette Journal of International Law and Dispute Resolution (1999)
- Order of the Barristers (1999)

### **Professional/Civic Activities**

- President, Federal Bar Association – Idaho Chapter (March 2011 to present)
- Idaho Supreme Court Civil Rules Advisory Committee (2009 to present)
- Board of Directors, Idaho Association of Defense Counsel (2011 to present)
- Board of Directors, Ronald McDonald House Charities of Idaho (2004 to 2015)
- Board of Directors, Federal Defender Services of Idaho (2008 to present)
- Defense Research Institute (2004 to present)
- Instructor at University of Idaho School of Law's Trial Advocate Program (2010, 2012, 2014)
- Instructor at Federal Court Trial Skills program (2009, 2011)
- Adjunct Professor at Boise State University in Business Law (2001 to 2004)

### **Publications**

- Between a Rock and a Hard Place: Limitations on a Health Care Provider's Right to Indemnification When it is Targeted Under the False Claims Act as a Result of the Fraudulent Activities of a Third Party with Which it Contracts or Associates, The Federal Lawyer, February 2009
- 50-State Survey on Legal Malpractice (Idaho), American Bar Association (2009 to present)
- FMLA Changes Now In Effect, Idaho Employment Law Letter, February 2009

### **Education**

- Willamette University College of Law in Salem, Oregon (1999), J.D.
- Carroll College in Helena, Montana (1996), B.A. (Business Administration and Political Science)

### **Court and Bar Admissions**

- All Idaho state courts
- Idaho Court of Appeals
- Idaho Supreme Court
- U.S. District Courts for the District of Idaho
- U.S. Court of Appeals for the Ninth Circuit
- Idaho State Bar Association (1999 – present)
- American Bar Association (1999 – present)
- Oregon State Bar

# **Exhibit B**

**EXHIBIT B**  
**(to the Declaration of Keely E. Duke in Support of**  
**Defendant James A. Bevis's Motion for Fees and Costs)**

**Attorney Fees**

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
11/13/2017	ADL	Review and analysis of complaint in preparation for initial meeting with client regarding facts of claim;	180.00	0.30	54.00
	ADL	Analysis of timing of service and IRCP 4 regarding timeliness of service of process in connection with analysis of defenses for responsive pleading;	180.00	0.20	36.00
	ADL	Review and analysis of docket history for underlying matter;	180.00	0.20	36.00
	ADL	Review and analysis of docket history of current matter regarding Disqualifying determination;	180.00	0.10	18.00
	ADL	Preparation of motion to Disqualify presiding judge and proposed order;	180.00	0.20	36.00
	ADL	Analysis of Statute of Limitation defense and applicable law in connection with preparation of responsive pleading;	180.00	1.60	288.00
	ADL	Analysis of cause of action and allegations of fault in connection with preparation of responsive pleading;	180.00	0.30	54.00
	KED	Review the Complaint;	225.00	0.20	45.00
	KED	Telephone conference with Mr. Bevis regarding this new matter;	225.00	0.40	90.00
	KED	Telephone conference with Kobi Gibbs regarding this new matter;	225.00	0.10	22.50
	KED	Review the correspondence from Mr. Bevis regarding this matter;	225.00	0.10	22.50

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
11/14/2017	JLS	Receive, review, and analyze records from client (approx. 2100 pages), begin electronic bookmarking to the file, for purposes of creating a chronologized version of all records for use in upcoming meeting with Mr. Bevis;	108.00	2.30	248.40
11/15/2017	JLS	Continue analysis of records from client (approx. 2100 pages), continue electronic bookmarking to the file for purposes of creating a chronologized version of all records for use in upcoming meeting with Mr. Bevis;	108.00	5.20	561.60
11/16/2017	ADL	Review and analysis of documents from client (approx. 2100 pages) in preparation for client meeting;	180.00	2.60	468.00
	ADL	Meet with client regarding case background in connection with preparation of responsive pleading;	180.00	2.50	450.00
	JLS	Analysis of additional information needed;	108.00	0.40	43.20
	JLS	Continue summarizing handwritten notes from client's files (approx. 2100 pages);	108.00	2.80	302.40
	JLS	Prepare timeline to the judgment paperwork, the stipulation to enter the judgment/decreed, the motion to withdraw the stipulation, and the notes provided thus far from client;	108.00	0.80	86.40
	JLS	Extract key records from client's file (approx. 2100 pages) in preparation for upcoming meeting;	108.00	0.10	10.80
	JLS	Create case core materials for meeting;	108.00	0.20	21.60
	KED	Prepare for client meeting by reviewing file materials;	225.00	1.00	225.00

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	KED	Attend the meeting with Mr. Bevis;	225.00	2.50	562.50
	KED	Continue preparing the Motion to Dismiss outline re this matter;	225.00	0.50	112.50
	KED	Review the records from client;	225.00	0.80	180.00
11/17/2017	KED	Revise and finalize the Motion to Disqualify;	225.00	0.10	22.50
11/19/2017	JLS	Catalogue all records received from client to date, (approx.. 800 of 2100 pages), in preparation for upcoming discovery;	108.00	1.80	194.40
11/21/2017	ADL	Preparation of motion to dismiss and memo in support;	180.00	1.40	252.00
	ADL	Research regarding motion to dismiss for failure to state a claim legal standard and analogous cases in connection with memorandum in support of motion to dismiss;	180.00	1.90	342.00
11/22/2017	ADL	Research regarding IRCP 11 factual support for allegations and "upon information and belief" caveat in connection with motion to dismiss;	180.00	1.70	306.00
	ADL	Research regarding attorney malpractice alleged as breach of fiduciary duty in connection with motion to dismiss;	180.00	0.90	162.00
	ADL	Research regarding elements of attorney malpractice claim in connection with motion to dismiss;	180.00	0.30	54.00
	ADL	Research regarding analogous attorney malpractice, disclosure of confidential communications actions in connection with motion to dismiss;	180.00	0.80	144.00

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	ADL	Further preparation of memorandum in support of motion to dismiss, including argument section re form over function, failure to allege valid cause of action, and failure to allege sufficient information to support a claim for relief;	180.00	3.10	558.00
11/23/2017	ADL	Research regarding "substance over form" rationale as applied in causes of action for attorney malpractice in connection with motion to dismiss;	180.00	1.20	216.00
	ADL	Further preparation of memorandum in support of motion to dismiss, including analysis regarding Plaintiff's failure to correctly characterize her cause of action;	180.00	1.30	234.00
11/24/2017	JLS	Catalogue/summarize all records received from client to date in preparation for upcoming discovery matters (approx.. 500 of 2100 pages);	108.00	4.10	442.80
11/25/2017	JLS	Catalogue/summarize all records received from client to date in preparation for upcoming discovery matters (approx.. 800 of 2100 pages);	108.00	3.20	345.60
11/27/2017	KED	Review and revise the memorandum in support of the Motion to Dismiss;	225.00	1.50	337.50
11/28/2017	ADL	Further preparation of memorandum in support of motion to dismiss, including analysis of sufficiency of factual support for allegations argument and analysis of Complaint;	180.00	0.40	72.00
	ADL	Email with client regarding memorandum in support of motion to dismiss;	180.00	0.10	18.00



<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	ADL	Telephone conference with client regarding memorandum in support of motion to dismiss;	180.00	0.20	36.00
11/30/2017	ADL	Telephone conference with client regarding memorandum in support of motion to dismiss;	180.00	0.30	54.00
	ADL	Further preparation of memorandum in support of motion to dismiss, including information and recommendations from client;	180.00	0.40	72.00
12/01/2017	ADL	Further preparation of memo in support of motion to dismiss;	180.00	0.30	54.00
	KED	Finalize the Motion to Dismiss;	225.00	1.00	225.00
12/06/2017	JLS	Begin review, analysis, electronic bookmarking, and cataloguing of additional underlying legal files from client (page range approximately 13,000 initially);	108.00	2.30	248.40
12/07/2017	JLS	Continue review, analysis, electronic bookmarking, and cataloguing of additional underlying legal files from James Bevis (page range approximately 13,000 initially);	108.00	0.70	75.60
12/08/2017	JLS	Continue review, analysis, electronic bookmarking, and cataloguing of additional underlying legal files from James Bevis (page range approximately 13,000 initially);	108.00	0.80	86.40
12/12/2017	JLS	Continue review, analysis, electronic bookmarking, and cataloguing of additional underlying legal files from James Bevis (approx.. 600 pages of total page range approximately 13,000);	108.00	2.60	280.80
12/13/2017	ADL	Receipt and review order regarding motion to disqualify;	180.00	0.20	36.00

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	JLS	Continue review, analysis, electronic bookmarking, and cataloguing of additional underlying legal files from James Bevis (approx. 700 of total page range approximately 13,000);	108.00	0.80	86.40
	KED	Review the notice of the Court regarding the Disqualification we filed;	225.00	0.10	22.50
	KED	Analysis re notice of the Court on motion to disqualify;	225.00	0.20	45.00
12/14/2017	ADL	Preparation of document re motion to disqualify;	180.00	0.20	36.00
	ADL	Telephone conference with client;	180.00	0.10	18.00
	ADL	Receipt and review of affidavit of service;	180.00	0.10	18.00
	KED	Review and evaluate Affidavit of Service filed by plaintiff's counsel today;	225.00	0.10	22.50
	KED	Review the Affidavit of Service filed today by plaintiff;	225.00	0.10	22.50
12/15/2017	JLS	Continue review and analysis of electronic files to confirm integrity of all scans, continue OCR of all files, electronic bookmarking, and catalogue underlying legal files from James Bevis (approx. 1000 pages of total files from Mr. Bevis approximately 13,000 pages);	108.00	3.20	345.60
12/16/2017	JLS	Summarize/catalogue portions of the documents provided by Mr. Bevis (approx. 300 pages);	108.00	0.40	43.20

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
12/20/2017	JLS	Continue review and analysis of scanned images of Mr. Bevis' legal files to ensure integrity of the scans compared to original files, in preparation for providing originals back to Mr. Bevis (reviewing and modifying bookmarks on approx. 1000 pages);	108.00	0.80	86.40
	KED	Review the Notice of Reassignment to Judge Medema;	225.00	0.10	22.50
12/21/2017	JLS	Continue review and analysis of Mr. Bevis' legal files (continuing review of and modification of electronic bookmarks on approx. 1000 pages);	108.00	0.60	64.80
12/27/2017	JLS	Coordinate, oversee, and revise electronic bookmarking of additional files from Mr. Bevis (approx. 1500 pages);	108.00	0.70	75.60
12/28/2017	JLS	Coordinate, oversee, and revise electronic bookmarking of additional files from Mr. Bevis (approx. 1500 pages);	108.00	0.70	75.60
	KED	Telephone call to the Court regarding obtaining a hearing date on our Motion to Dismiss;	225.00	0.10	22.50
01/01/2018	JLS	Analyze records from Jim Bevis (approx. 9000 pages) for duplications and relevance to the instant claims (this segment has not yet been catalogued, duplicative in part) and continue electronic bookmarking of these segments;	108.00	0.80	86.40
	JLS	Analyze, catalogue, and summarize records from client (approx. 200 pages);	108.00	0.80	86.40
1/02/2018	JLS	Complete cataloguing and summarizing records from client (approx. 200 pages);	108.00	1.80	194.40

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	JLS	Analyze, catalogue, and summarize records from client (approx. 600 pages);	108.00	2.60	280.80
1/12/2018	ADL	Email to client responding to inquiry;	180.00	0.20	36.00
	JLS	Review, analyze, and coordinate electronic bookmarking of Mr. Bevis' underlying files (approx. 500 pages);	108.00	1.20	129.60
1/15/2018	KED	Correspondence with Mr. Bevis regarding the case;	225.00	0.10	22.50
1/19/2018	JLS	Continue review, analysis, and revision of electronic bookmarks to the records from client (approx. 2000 pages);	108.00	1.30	140.40
	JLS	Continue review, analysis, and revision of electronic bookmarks to the records from client (approx. 300 pages);	108.00	0.20	21.60
	JLS	Analysis of and coordinate revisions to the electronic bookmarks to the records from client (approx. 5000 pages);	108.00	0.70	75.60
01/31/2018	ADL	Review and analysis of response to Motion to Dismiss in connection with preparation of reply;	180.00	0.60	108.00
	ADL	Preparation of reply in support of motion to dismiss;	180.00	2.90	522.00
	ADL	Review and analysis of authorities cited in Plaintiff's response brief in connection with preparation of reply in support of Motion to Dismiss;	180.00	2.40	432.00
	KED	Review and evaluate the opposition to the motion to dismiss;	225.00	0.60	135.00
	KED	Prepare outline regarding responding to same;	225.00	0.60	135.00

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
2/01/2018	ADL	Further preparation of reply in support of motion to dismiss, including introduction and analysis of Plaintiff's arguments regarding disgorgement of fees;	180.00	3.20	576.00
	ADL	Research regarding attorney fee forfeiture due to breach of fiduciary duty in connection with reply in support of motion to dismiss;	180.00	1.80	324.00
	ADL	Further preparation of reply in support of motion to dismiss, including distinguishing cases cited in Plaintiff's response memorandum;	180.00	1.40	252.00
	KED	Revise the Reply memorandum we are filing;	225.00	0.80	180.00
2/02/2018	ADL	Research regarding legal issue in response to call from client;	180.00	0.30	54.00
	ADL	Telephone call from client regarding case;	180.00	0.10	18.00
	ADL	Two calls to client re case;	180.00	0.20	36.00
	ADL	Further preparation of reply in support of motion to dismiss, including analysis regarding Plaintiff's authorities;	180.00	1.10	198.00
	ADL	Email to client responding to call;	180.00	0.20	36.00
	KED	Revise and finalize the Reply Memorandum;	225.00	1.00	225.00
2/05/2018	ADL	Preparation of outline for oral argument regarding Motion to Dismiss;	180.00	0.80	144.00
	KED	Correspondence with the Court regarding the Reply brief;	225.00	0.10	22.50
	KED	Telephone call to Mr. Bevis regarding case;	225.00	0.10	22.50
	KED	Correspondence to Mr. Bevis regarding same;	225.00	0.10	22.50

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	KED	Begin preparing for tomorrow's Motion to Dismiss hearing;	225.00	0.80	180.00
2/06/2018	ADL	Preparation for hearing on motion to dismiss, including case summaries and holdings for cases supporting arguments supporting dismissal;	180.00	1.40	252.00
	KED	Prepare for today's hearing on the Motion to Dismiss;	225.00	3.30	742.50
	KED	Handle today's hearing on the Motion to Dismiss;	225.00	2.00	450.00
2/09/2018	ADL	Receipt and review Plaintiff's motion to file supplemental brief including proposed supplemental brief and proposed order;	180.00	0.40	72.00
	KED	Review the request by plaintiff to file a supplemental memorandum and review the supplemental memo;	225.00	0.30	67.50
	KED	Review and evaluate the Motion for Leave to file a supplemental memorandum;	225.00	0.30	67.50
2/14/2018	KED	Receive and review Order Denying Plaintiff's Motion for Leave to File Supplemental Memorandum;	225.00	0.10	22.50
	ADL	Preparation of objection to Plaintiff's motion to file supplemental brief;	180.00	0.20	36.00
	ADL	Receipt and review order denying Plaintiff's motion for supplemental briefing;	180.00	0.10	18.00
	KED	Review the Order denying the request for supplemental briefing;	225.00	0.10	22.50
3/16/2018	ADL	Review and analysis of memorandum decision and order granting motion to dismiss (31 pages in length);	180.00	1.90	342.00
	KED	Brief review of the decision (we won);	225.00	0.10	22.50

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	KED	Correspondence to our clients regarding case;	225.00	0.10	22.50
	KED	Telephone call to Jim Bevis regarding case;	225.00	0.20	45.00
	KED	Review and evaluate the 30 page opinion by the Court;	225.00	1.00	225.00
3/19/2018	KED	Review the correspondence from client;	225.00	0.10	22.50
3/22/2018	ADL	Research regarding post-judgment matters;	180.00	2.10	378.00
3/23/2018	KED	Review the Judgment that was filed today;	225.00	0.10	22.50
	KED	Begin evaluating whether to file a Motion for fees;	225.00	0.40	90.00
	ADL	Status report to client regarding post-judgment matters;	180.00	1.20	216.00
3/26/2018	ADL	Further preparation of letter to client re post-judgment matters;	180.00	0.90	162.00
	ADL	Receipt and review of judgment;	180.00	0.10	18.00
TOTAL					\$17,863.20

### **Costs**

<i>Date</i>	<i>Description</i>	<i>Amount</i>
11/17/2017	First Appearance Fee and associated processing charge	\$140.08
11/17/2017	Copying charges (to copy 4,378-pages of client file)	\$437.80
1/31/2018	Copying charges (in connection with preparation of Reply in Support of Motion to Dismiss)	\$1.40
2/28/2018	Copying charges	\$14.00
TOTAL		\$593.28

KIM J. TROUT, ISB #2468  
TROUT LAW, PLLC  
3778 N. Plantation River Dr., Ste. 101  
Boise, ID 83703  
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Facsimile (208) 577-5756  
ktrout@trout-law.com

Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,  
  
Plaintiff,

vs.

JAMES E. BEVIS,  
  
Defendant.

Case No. CV01-17-08744

**MOTION TO DISALLOW  
COSTS AND FEES**

I.R.C.P. 54

Plaintiff Rebecca Parkinson respectfully moves this Court to disallow Bevis's verified memorandum of costs and fees, as set out in Parkinson's supporting legal brief, filed herewith.

DATED April 20, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 20, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

Keely E. Duke  
[ked@dukescanlan.com](mailto:ked@dukescanlan.com)

iCourt



Aubrey D. Lyon  
[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

/s/ Kim J. Trout  
Kim J. Trout

KIM J. TROUT, ISB #2468  
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Facsimile (208) 577-5756  
ktrout@trout-law.com

Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**LEGAL BRIEF IN SUPPORT OF  
MOTION TO DISALLOW COSTS  
AND FEES**

I.R.C.P. 54

Plaintiff Rebecca Parkinson respectfully submits this legal brief in support of her motion to disallow Bevis's verified memorandum of fees and costs, as follows:

**INTRODUCTION**

Parkinson filed a motion for reconsideration on April 6, 2018. The Court should disallow Bevis's memorandum of fees and costs for the reasons stated in that motion. If Court ultimately denies the motion, then it should only award Bevis partial costs and no attorney fees. Specifically, Bevis should only be allowed to recover his mandatory filing fee cost. Bevis's discretionary photocopying costs are not exceptional under the Rule 54(d) standards. In addition, Parkinson's claim was not frivolous or unfounded; rather, it was deemed to be valid (at least in terms of its form), and so it cannot be considered so plainly fallacious as to trigger Idaho Code § 12-121 fees.

**LEGAL STANDARDS**

"When costs are awarded to a party, that party is entitled to the following costs, actually paid, as a matter of right...court filing fees." (I.R.C.P. 54(d)(1)(C)(i)). "Additional items of cost...may be

allowed on a showing that the costs were necessary and exceptional costs, reasonably incurred, and should in the interest of justice be assessed against the adverse party.” (I.R.C.P. 54(d)(1)(D)).

“Idaho law regarding the recovery of attorney fees by litigants follows the ‘American rule,’ which requires that litigants bear their own attorney fees absent a contractual right or a statutory authorization.” *Gilliban v. Gump*, 140 Idaho 693, 695, 99 P.3d 1083, 1085 (Idaho Ct. App. Aug. 12, 2003).

“A district court should only award fees [under Idaho Code § 12-121] when it is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation.” *Garner v. Povey*, 151 Idaho 462, 468, 259 P.3d 608, 614 (Idaho Aug. 4, 2011).

### **LEGAL ARGUMENTS**

#### **1. The Court Should Disallow Fees and Costs Due to Parkinson’s Pending Motion for Reconsideration:**

The Court should disallow all costs and fees due to Parkinson’s pending motion for reconsideration. If granted, Bevis will not be a prevailing party in the matter, and Parkinson will be allowed to address her claim on its actual merits, i.e., as a breach of fiduciary duty claim. The Court erred by holding that Parkinson should have brought her claim as a legal malpractice claim. As explained in her pending motion, Parkinson was entitled to plead a breach of fiduciary duty claim under the standards of *Rockefeller I* and the Restatement (Third) of the Law Governing Lawyers. The question of who prevailed on Parkinson’s real claim, i.e., her breach of fiduciary duty claim, can only be decided once the case is reopened and the merits of the claim are fully and fairly litigated.

#### **2. In the alternative, the Court Should Only Allow Mandatory Costs:**

In the alternative, if the Court denies Parkinson’s motion for reconsideration, then the Court should only award Bevis his mandatory filing fee cost of \$140.08. This is the only cost which Bevis asks for under I.R.C.P. 54(d)(1)(C), and it is the only cost he can legitimately recover.

The Court should deny Bevis’s request for discretionary photocopy costs of \$435.20. Bevis cites to the case *Hayden Lake Fire Dept. v. Alcorn* to support this discretionary costs claim. But *Hayden Lake Fire Dept.* is incongruent with Bevis’s own position. In that case, the Court found that discretionary costs “may include” photocopying—but the Court went on to explain:

“[The Idaho Supreme Court] has always construed the requirement that a cost be ‘exceptional’ under I.R.C.P. 54(d)(1)(D) to include those costs incurred because the nature of the case was itself exceptional.”

*Id.*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005). The District Court in *Hayden* granted the prevailing party its discretionary photocopy costs due to the apparent “exceptional” nature of the case, i.e., a large class action lawsuit which involved claims by SIF of approximately \$28,301.14 in mandatory costs and \$516,753.18 in discretionary costs. By contrast, Bevis’s own arguments suggest that this is nothing more than a routine legal malpractice case. In fact, Bevis states at some length in his prior briefing that the case is “well established” under *Bishop* and other Idaho precedents. By these admissions, Bevis establishes that this is not an exceptional case. Moreover, Bevis does not take the time to explain why the case was exceptional; he only says that he incurred the photocopying costs in anticipation of his eventual defense. This conclusory argument, if adopted, would convert every routine case into an exceptional case, which goes against the language of Rule 54(d)(1)(D).

Idaho case law generally does not allow photocopy costs as discretionary costs. For instance, in *Fish v. Smith*, 131 Idaho 492, 960 P.2d 175 (1998), the Court refused to allow discretionary photocopy costs in a personal injury jury case, saying “...travel and lodging expenses for expert witnesses and attorneys and photocopy expenses are not exceptional but, on the contrary, are common in a case of this nature.” *Id.*, at p. 493. And, in *Auto. Club Ins. Co. v. Jackson*, 124 Idaho 874, 865 P.2d 965 (1993), the Court refused to allow photocopying costs, explaining: “Nowhere in the record do the cross-appellants attempt to explain why these [photocopying] charges were necessary and exceptional, and should in the interest of justice be assessed against the adverse party.” *Id.*, at p. 881. Bevis’s case is much more analogous to *Fish* and to *Auto Club*, i.e., it is a routine case, with routine litigation costs. The Court should follow these precedents and disallow Bevis’s photocopying costs.

Finally, Bevis’s photocopying costs were not “reasonable” under the circumstances. Bevis insists that Parkinson’s claim is really a legal malpractice claim, not a breach of fiduciary duty claim. This fact is important because Bevis knew up-front that Parkinson had not alleged a legal malpractice claim. Therefore, Bevis should have postponed his photocopying efforts until his preliminary Rule 12 motion had been decided. Bevis admits that the reason he photocopied the divorce case file (4,378 pp.) was

done in anticipation of his later discovery needs: “If this case had proceeded to discovery, a detailed analysis of nearly every aspect of the underlying divorce action would have been necessary to defend against the allegations of impropriety, and it was necessary for counsel to obtain a complete copy of Mr. Bevis’s file to prepare the defense.” (*Defendant’s Verified Memorandum of Costs and Fees*, p. 4). It was simply not reasonable for Bevis to photocopy all his files prior to a ruling on his Rule 12 motion, knowing that the photocopies would not be needed until much later in the case.

### **3. The Court Should Disallow All Attorney Fees under Idaho Code § 12-121:**

In all events, the Court should disallow Bevis’s request for attorney fees under Idaho Code § 12-121. Idaho case law is clear: “A district court should only award fees [under Idaho Code § 12-121] when it is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation.” *Garner v. Povey*, 151 Idaho 462, 468, 259 P.3d 608, 614 (Idaho Aug. 4, 2011) (emphasis added). Here, the Court found that Parkinson’s claim was valid—at least in terms of its form: “This Court concludes Plaintiff may sue her former attorney for breach of a fiduciary duty arising out of the attorney-client relationship, just like other principals may sue their agents who owe them a fiduciary duty. The test articulated by the Idaho Supreme Court in *Rockefeller I* and in the Restatement (Third) of the Law Governing Lawyers is applicable to those claims.” (*Memorandum Decision*, p. 24). The Court’s ultimate conclusions on the form of Parkinson’s claim, coupled with the Court’s lengthy analysis on the substance of the claim, shows that the claim (as breach of fiduciary duty) was fairly debatable, and that fact is enough to prevent Bevis from claiming § 12-121 fees: “A court must determine whether the evidence adduced is sufficient, albeit disputed, to establish a fairly debatable issue under the legal theories advanced by the plaintiff...attorney fees should be awarded under I.C. § 12-121 only if the position advocated by the non-prevailing party is plainly fallacious and, therefore, not fairly debatable.” *Assocs. Nw. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987). See also *Gulf Chem. Emps. Fed. Credit Union v. Williams*, 107 Idaho 890, 895, 693 P.2d 1092, 1097 (Ct. App. 1984) (“...when a fairly debatable claim is deemed frivolous for no stated reason other than its ultimate failure upon a point of law, we believe discretion has been abused.”); *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 911, 684 P.2d 307, 313 (Ct. App. 1984) (“A misperception of law or of one’s

interest under the law is not, by itself, unreasonable conduct. If it were, virtually every case controlled by a question of law would entail an attorney fee award against the losing party under I.C. § 12-121. Rather, the question must be whether the position adopted by the owner was not only incorrect but so plainly fallacious that it could be deemed frivolous, unreasonable or without foundation.”).

In addition, Parkinson’s claim involved a novel application of Idaho case law—a fact which precludes all §12-121 fees. Parkinson alleged that Bevis breached his fiduciary duties of confidentiality and should forfeit and/or disgorge his attorney compensation. Up to this time, the Idaho Supreme Court has only extended its *Rockefeller I* forfeiture analysis to real estate agents, not to attorneys. Here, the Court correctly held in its memorandum decision that the *Rockefeller I* forfeiture standards are the same as those set out in Section § 37 of the Restatement (Third) of the Law Governing Lawyers—which suggests that Parkinson was justified in arguing her breach of fiduciary duty claim as an extension of those standards. See *Karel v. Dep’t of Fin. (In re Karel)*, 144 Idaho 379, 384, 162 P.3d 758, 763 (2007); *Blake v. Starr*, 146 Idaho 847, 852, 203 P.3d 1246, 1251 (2009).

It should be noted, in passing, that the Court is only allowed to grant Bevis his “reasonable” attorney fees. Bevis’s fees, as stated, are grossly excessive and unreasonable. For instance, Bevis admits in his supporting declaration that a large portion of his fees are dedicated to copying and organizing files which would not be used until later in the case. (See time entries for: 11/14 (2.30 hrs.), 11/15 (5.20 hrs.), 11/16 (2.60 hrs. + 2.80 hrs. + .80 hrs. + .10 hrs. + 1.00 hrs. + .80 hrs.), 11/19 (1.80 hrs.), 11/24 (4.10 hours), 11/25 (3.20 hours), 12/06 (2.30 hrs.), 12/07 (.70 hrs.), 12/08 (.80 hrs.), 12/12 (2.60 hrs.), 12/13 (.80 hrs.), 12/15 (3.20 hrs.), 12/16 (.40 hrs.), 12/20 (.80 hrs.), 12/21 (.60 hrs.), 12/27 (.70 hrs.), 12/28 (.70 hrs.), 1/01 (.80 hrs. + .80 hrs.), 1/02 (1.80 hrs. + 2.60 hrs.), 1/12 (.20 hrs. + 1.20 hrs.), 1/19 (1.30 hrs. + .20 hrs. + .70 hrs.))<sup>1</sup>. Bevis fails to explain why this effort was necessary prior to his Rule 12 motion, and so any fees associated with the copying and organizing of his case files should be disallowed. But to reiterate—any fee award under Idaho Code § 12-121 should be disallowed, whether Bevis’s fees were reasonable or not. The important point is that Parkinson’s claim was

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<sup>1</sup> These are highlighted in yellow on the attached “Exhibit B (to the Declaration of Keeley E. Duke in Support of Defendant James A. Bevis’s Motion for Fees and Costs).

not frivolous and was fairly debatable, as seen from the record. It would be an abuse of discretion to allow Bevis any portion of his fees, even those related to his Rule 12 defense.

**4. The Court Should Disallow the Discretionary Costs:**

Bevis has not made a showing that the requested discretionary costs, “were necessary and exceptional costs, reasonably incurred, and should in the interest of justice be assessed against” Parkinson. The discretionary costs of \$453.20 for “copying” is presumably for copying Mr. Bevis’ file. As discussed above, Bevis fails to explain why this effort was necessary prior to the decision of his Rule 12 motion. Moreover, Bevis makes no showing as to why the copying costs “were necessary **and** exceptional.” Bevis has the burden, under Rule 54(d)(1)(D), to prove the exceptional nature of the requested discretionary costs, and he has failed to do so. Therefore, said costs should be disallowed.

**CONCLUSION**

Parkinson respectfully asks the Court to grant her pending motion for reconsideration and to disallow all Bevis’s costs and fees. In the alternative, the Court should only award Bevis his mandatory filing fee cost and disallow all attorney fees under Idaho Code § 12-121.

DATED April 20, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 20, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

Keely E. Duke  
[ked@dukescanlan.com](mailto:ked@dukescanlan.com)

iCourt



Aubrey D. Lyon  
[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

/s/ Kim J. Trout  
Kim J. Trout



# EXHIBIT A

**EXHIBIT B**  
**(to the Declaration of Keely E. Duke in Support of**  
**Defendant James A. Bevis's Motion for Fees and Costs)**

**Attorney Fees**

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
11/13/2017	ADL	Review and analysis of complaint in preparation for initial meeting with client regarding facts of claim;	180.00	0.30	54.00
	ADL	Analysis of timing of service and IRCP 4 regarding timeliness of service of process in connection with analysis of defenses for responsive pleading;	180.00	0.20	36.00
	ADL	Review and analysis of docket history for underlying matter;	180.00	0.20	36.00
	ADL	Review and analysis of docket history of current matter regarding Disqualifying determination;	180.00	0.10	18.00
	ADL	Preparation of motion to Disqualify presiding judge and proposed order;	180.00	0.20	36.00
	ADL	Analysis of Statute of Limitation defense and applicable law in connection with preparation of responsive pleading;	180.00	1.60	288.00
	ADL	Analysis of cause of action and allegations of fault in connection with preparation of responsive pleading;	180.00	0.30	54.00
	KED	Review the Complaint;	225.00	0.20	45.00
	KED	Telephone conference with Mr. Bevis regarding this new matter;	225.00	0.40	90.00
	KED	Telephone conference with Kobi Gibbs regarding this new matter;	225.00	0.10	22.50
	KED	Review the correspondence from Mr. Bevis regarding this matter;	225.00	0.10	22.50

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
11/14/2017	JLS	Receive, review, and analyze records from client (approx. 2100 pages), begin electronic bookmarking to the file, for purposes of creating a chronologized version of all records for use in upcoming meeting with Mr. Bevis;	108.00	2.30	248.40
11/15/2017	JLS	Continue analysis of records from client (approx. 2100 pages), continue electronic bookmarking to the file for purposes of creating a chronologized version of all records for use in upcoming meeting with Mr. Bevis;	108.00	5.20	561.60
11/16/2017	ADL	Review and analysis of documents from client (approx. 2100 pages) in preparation for client meeting;	180.00	2.60	468.00
	ADL	Meet with client regarding case background in connection with preparation of responsive pleading;	180.00	2.50	450.00
	JLS	Analysis of additional information needed;	108.00	0.40	43.20
	JLS	Continue summarizing handwritten notes from client's files (approx. 2100 pages);	108.00	2.80	302.40
	JLS	Prepare timeline to the judgment paperwork, the stipulation to enter the judgment/decreed, the motion to withdraw the stipulation, and the notes provided thus far from client;	108.00	0.80	86.40
	JLS	Extract key records from client's file (approx. 2100 pages) in preparation for upcoming meeting;	108.00	0.10	10.80
	JLS	Create case core materials for meeting;	108.00	0.20	21.60
	KED	Prepare for client meeting by reviewing file materials;	225.00	1.00	225.00

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	KED	Attend the meeting with Mr. Bevis;	225.00	2.50	562.50
	KED	Continue preparing the Motion to Dismiss outline re this matter;	225.00	0.50	112.50
	KED	Review the records from client;	225.00	0.80	180.00
11/17/2017	KED	Revise and finalize the Motion to Disqualify;	225.00	0.10	22.50
11/19/2017	JLS	Catalogue all records received from client to date, (approx.. 800 of 2100 pages), in preparation for upcoming discovery;	108.00	1.80	194.40
11/21/2017	ADL	Preparation of motion to dismiss and memo in support;	180.00	1.40	252.00
	ADL	Research regarding motion to dismiss for failure to state a claim legal standard and analogous cases in connection with memorandum in support of motion to dismiss;	180.00	1.90	342.00
11/22/2017	ADL	Research regarding IRCP 11 factual support for allegations and "upon information and belief" caveat in connection with motion to dismiss;	180.00	1.70	306.00
	ADL	Research regarding attorney malpractice alleged as breach of fiduciary duty in connection with motion to dismiss;	180.00	0.90	162.00
	ADL	Research regarding elements of attorney malpractice claim in connection with motion to dismiss;	180.00	0.30	54.00
	ADL	Research regarding analogous attorney malpractice, disclosure of confidential communications actions in connection with motion to dismiss;	180.00	0.80	144.00

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	ADL	Further preparation of memorandum in support of motion to dismiss, including argument section re form over function, failure to allege valid cause of action, and failure to allege sufficient information to support a claim for relief;	180.00	3.10	558.00
11/23/2017	ADL	Research regarding "substance over form" rationale as applied in causes of action for attorney malpractice in connection with motion to dismiss;	180.00	1.20	216.00
	ADL	Further preparation of memorandum in support of motion to dismiss, including analysis regarding Plaintiff's failure to correctly characterize her cause of action;	180.00	1.30	234.00
11/24/2017	JLS	Catalogue/summarize all records received from client to date in preparation for upcoming discovery matters (approx.. 500 of 2100 pages);	108.00	4.10	442.80
11/25/2017	JLS	Catalogue/summarize all records received from client to date in preparation for upcoming discovery matters (approx.. 800 of 2100 pages);	108.00	3.20	345.60
11/27/2017	KED	Review and revise the memorandum in support of the Motion to Dismiss;	225.00	1.50	337.50
11/28/2017	ADL	Further preparation of memorandum in support of motion to dismiss, including analysis of sufficiency of factual support for allegations argument and analysis of Complaint;	180.00	0.40	72.00
	ADL	Email with client regarding memorandum in support of motion to dismiss;	180.00	0.10	18.00

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	ADL	Telephone conference with client regarding memorandum in support of motion to dismiss;	180.00	0.20	36.00
11/30/2017	ADL	Telephone conference with client regarding memorandum in support of motion to dismiss;	180.00	0.30	54.00
	ADL	Further preparation of memorandum in support of motion to dismiss, including information and recommendations from client;	180.00	0.40	72.00
12/01/2017	ADL	Further preparation of memo in support of motion to dismiss;	180.00	0.30	54.00
	KED	Finalize the Motion to Dismiss;	225.00	1.00	225.00
12/06/2017	JLS	Begin review, analysis, electronic bookmarking, and cataloguing of additional underlying legal files from client (page range approximately 13,000 initially);	108.00	2.30	248.40
12/07/2017	JLS	Continue review, analysis, electronic bookmarking, and cataloguing of additional underlying legal files from James Bevis (page range approximately 13,000 initially);	108.00	0.70	75.60
12/08/2017	JLS	Continue review, analysis, electronic bookmarking, and cataloguing of additional underlying legal files from James Bevis (page range approximately 13,000 initially);	108.00	0.80	86.40
12/12/2017	JLS	Continue review, analysis, electronic bookmarking, and cataloguing of additional underlying legal files from James Bevis (approx.. 600 pages of total page range approximately 13,000);	108.00	2.60	280.80
12/13/2017	ADL	Receipt and review order regarding motion to disqualify;	180.00	0.20	36.00

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	JLS	Continue review, analysis, electronic bookmarking, and cataloguing of additional underlying legal files from James Bevis (approx. 700 of total page range approximately 13,000);	108.00	0.80	86.40
	KED	Review the notice of the Court regarding the Disqualification we filed;	225.00	0.10	22.50
	KED	Analysis re notice of the Court on motion to disqualify;	225.00	0.20	45.00
12/14/2017	ADL	Preparation of document re motion to disqualify;	180.00	0.20	36.00
	ADL	Telephone conference with client;	180.00	0.10	18.00
	ADL	Receipt and review of affidavit of service;	180.00	0.10	18.00
	KED	Review and evaluate Affidavit of Service filed by plaintiff's counsel today;	225.00	0.10	22.50
	KED	Review the Affidavit of Service filed today by plaintiff;	225.00	0.10	22.50
12/15/2017	JLS	Continue review and analysis of electronic files to confirm integrity of all scans, continue OCR of all files, electronic bookmarking, and catalogue underlying legal files from James Bevis (approx. 1000 pages of total files from Mr. Bevis approximately 13,000 pages);	108.00	3.20	345.60
12/16/2017	JLS	Summarize/catalogue portions of the documents provided by Mr. Bevis (approx. 300 pages);	108.00	0.40	43.20

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
12/20/2017	JLS	Continue review and analysis of scanned images of Mr. Bevis' legal files to ensure integrity of the scans compared to original files, in preparation for providing originals back to Mr. Bevis (reviewing and modifying bookmarks on approx. 1000 pages);	108.00	0.80	86.40
	KED	Review the Notice of Reassignment to Judge Medema;	225.00	0.10	22.50
12/21/2017	JLS	Continue review and analysis of Mr. Bevis' legal files (continuing review of and modification of electronic bookmarks on approx. 1000 pages);	108.00	0.60	64.80
12/27/2017	JLS	Coordinate, oversee, and revise electronic bookmarking of additional files from Mr. Bevis (approx. 1500 pages);	108.00	0.70	75.60
12/28/2017	JLS	Coordinate, oversee, and revise electronic bookmarking of additional files from Mr. Bevis (approx. 1500 pages);	108.00	0.70	75.60
	KED	Telephone call to the Court regarding obtaining a hearing date on our Motion to Dismiss;	225.00	0.10	22.50
01/01/2018	JLS	Analyze records from Jim Bevis (approx. 9000 pages) for duplications and relevance to the instant claims (this segment has not yet been catalogued, duplicative in part) and continue electronic bookmarking of these segments;	108.00	0.80	86.40
	JLS	Analyze, catalogue, and summarize records from client (approx. 200 pages);	108.00	0.80	86.40
1/02/2018	JLS	Complete cataloguing and summarizing records from client (approx. 200 pages);	108.00	1.80	194.40



<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	JLS	Analyze, catalogue, and summarize records from client (approx. 600 pages);	108.00	2.60	280.80
1/12/2018	ADL	Email to client responding to inquiry;	180.00	0.20	36.00
	JLS	Review, analyze, and coordinate electronic bookmarking of Mr. Bevis' underlying files (approx. 500 pages);	108.00	1.20	129.60
1/15/2018	KED	Correspondence with Mr. Bevis regarding the case;	225.00	0.10	22.50
1/19/2018	JLS	Continue review, analysis, and revision of electronic bookmarks to the records from client (approx. 2000 pages);	108.00	1.30	140.40
	JLS	Continue review, analysis, and revision of electronic bookmarks to the records from client (approx. 300 pages);	108.00	0.20	21.60
	JLS	Analysis of and coordinate revisions to the electronic bookmarks to the records from client (approx. 5000 pages);	108.00	0.70	75.60
01/31/2018	ADL	Review and analysis of response to Motion to Dismiss in connection with preparation of reply;	180.00	0.60	108.00
	ADL	Preparation of reply in support of motion to dismiss;	180.00	2.90	522.00
	ADL	Review and analysis of authorities cited in Plaintiff's response brief in connection with preparation of reply in support of Motion to Dismiss;	180.00	2.40	432.00
	KED	Review and evaluate the opposition to the motion to dismiss;	225.00	0.60	135.00
	KED	Prepare outline regarding responding to same;	225.00	0.60	135.00

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
2/01/2018	ADL	Further preparation of reply in support of motion to dismiss, including introduction and analysis of Plaintiff's arguments regarding disgorgement of fees;	180.00	3.20	576.00
	ADL	Research regarding attorney fee forfeiture due to breach of fiduciary duty in connection with reply in support of motion to dismiss;	180.00	1.80	324.00
	ADL	Further preparation of reply in support of motion to dismiss, including distinguishing cases cited in Plaintiff's response memorandum;	180.00	1.40	252.00
	KED	Revise the Reply memorandum we are filing;	225.00	0.80	180.00
2/02/2018	ADL	Research regarding legal issue in response to call from client;	180.00	0.30	54.00
	ADL	Telephone call from client regarding case;	180.00	0.10	18.00
	ADL	Two calls to client re case;	180.00	0.20	36.00
	ADL	Further preparation of reply in support of motion to dismiss, including analysis regarding Plaintiff's authorities;	180.00	1.10	198.00
	ADL	Email to client responding to call;	180.00	0.20	36.00
	KED	Revise and finalize the Reply Memorandum;	225.00	1.00	225.00
2/05/2018	ADL	Preparation of outline for oral argument regarding Motion to Dismiss;	180.00	0.80	144.00
	KED	Correspondence with the Court regarding the Reply brief;	225.00	0.10	22.50
	KED	Telephone call to Mr. Bevis regarding case;	225.00	0.10	22.50
	KED	Correspondence to Mr. Bevis regarding same;	225.00	0.10	22.50

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	KED	Begin preparing for tomorrow's Motion to Dismiss hearing;	225.00	0.80	180.00
2/06/2018	ADL	Preparation for hearing on motion to dismiss, including case summaries and holdings for cases supporting arguments supporting dismissal;	180.00	1.40	252.00
	KED	Prepare for today's hearing on the Motion to Dismiss;	225.00	3.30	742.50
	KED	Handle today's hearing on the Motion to Dismiss;	225.00	2.00	450.00
2/09/2018	ADL	Receipt and review Plaintiff's motion to file supplemental brief including proposed supplemental brief and proposed order;	180.00	0.40	72.00
	KED	Review the request by plaintiff to file a supplemental memorandum and review the supplemental memo;	225.00	0.30	67.50
	KED	Review and evaluate the Motion for Leave to file a supplemental memorandum;	225.00	0.30	67.50
2/14/2018	KED	Receive and review Order Denying Plaintiff's Motion for Leave to File Supplemental Memorandum;	225.00	0.10	22.50
	ADL	Preparation of objection to Plaintiff's motion to file supplemental brief;	180.00	0.20	36.00
	ADL	Receipt and review order denying Plaintiff's motion for supplemental briefing;	180.00	0.10	18.00
	KED	Review the Order denying the request for supplemental briefing;	225.00	0.10	22.50
3/16/2018	ADL	Review and analysis of memorandum decision and order granting motion to dismiss (31 pages in length);	180.00	1.90	342.00
	KED	Brief review of the decision (we won);	225.00	0.10	22.50

<i>Date</i>	<i>Timekeeper</i>	<i>Description</i>	<i>Rate</i>	<i>Hours</i>	<i>Charge</i>
	KED	Correspondence to our clients regarding case;	225.00	0.10	22.50
	KED	Telephone call to Jim Bevis regarding case;	225.00	0.20	45.00
	KED	Review and evaluate the 30 page opinion by the Court;	225.00	1.00	225.00
3/19/2018	KED	Review the correspondence from client;	225.00	0.10	22.50
3/22/2018	ADL	Research regarding post-judgment matters;	180.00	2.10	378.00
3/23/2018	KED	Review the Judgment that was filed today;	225.00	0.10	22.50
	KED	Begin evaluating whether to file a Motion for fees;	225.00	0.40	90.00
	ADL	Status report to client regarding post-judgment matters;	180.00	1.20	216.00
3/26/2018	ADL	Further preparation of letter to client re post-judgment matters;	180.00	0.90	162.00
	ADL	Receipt and review of judgment;	180.00	0.10	18.00
TOTAL					\$17,863.20

### **Costs**

<i>Date</i>	<i>Description</i>	<i>Amount</i>
11/17/2017	First Appearance Fee and associated processing charge	\$140.08
11/17/2017	Copying charges (to copy 4,378-pages of client file)	\$437.80
1/31/2018	Copying charges (in connection with preparation of Reply in Support of Motion to Dismiss)	\$1.40
2/28/2018	Copying charges	\$14.00
TOTAL		\$593.28

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Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,  
  
Plaintiff,

vs.

JAMES E. BEVIS,  
  
Defendant.

Case No. CV01-17-08744

**NOTICE OF HEARING**

PLEASE TAKE NOTICE that on June 4, 2018, at the hour of 2:00 p.m., or as soon thereafter as counsel can be heard, in the courtroom of the Ada County Courthouse, before the Honorable Judge Jonathan Medema, the undersigned will call up for hearing Motion to Disallow Attorneys' Fees and Costs.

DATED April 20, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 20, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

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/s/ Kim J. Trout  
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*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**NOTICE OF HEARING**

PLEASE TAKE NOTICE, defendant James A. Bevis by and through his counsel of record, Duke Scanlan & Hall, PLLC, have set before this Court to be heard his Motion for Fees and Costs. Said motion is set to be heard before the Honorable Jonathan Medema on the 4<sup>th</sup> day of June, 2018, at 2:00 pm at the Ada County Courthouse, Boise, Idaho.

DATED this 24<sup>th</sup> day of April, 2018.

DUKE SCANLAN & HALL, PLLC

By /s/ Keely E. Duke

Keely E. Duke – Of the Firm

Aubrey D. Lyon – Of the Firm

*Attorneys for Defendant James A. Bevis*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 24<sup>th</sup> day of April, 2018, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

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/s/ Keely E. Duke

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Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,  
  
Plaintiff,

vs.

JAMES E. BEVIS,  
  
Defendant.

Case No. CV01-17-08744

**NOTICE OF HEARING**

PLEASE TAKE NOTICE that on JUNE 4, at the hour of 2:00 p.m., or as soon thereafter as counsel can be heard, in the courtroom of the Ada County Courthouse, before the Honorable Judge Jonathan Medema, the undersigned will call up for hearing Plaintiff's Motion to Reconsider and Motion to Amend Complaint.

DATED May 24, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 24, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

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Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,  
  
Plaintiff,

vs.

JAMES E. BEVIS,  
  
Defendant.

Case No. CV01-17-08744

**MOTION TO SHORTEN TIME  
FOR HEARING**

PLAINTIFF, by and through her counsel of record, Kim J. Trout, hereby moves this Court for an order shortening time in which to have Plaintiff's Motion to Reconsider and Motion to Amend Complaint heard. This motion is made on the grounds that Plaintiff's Motion was filed on April 20, 2018. Plaintiff was advised by the Clerk that the Court intended to rule on Plaintiffs' pending motions without hearing, however the Idaho Rules of Civil Procedure do not set a response time without a hearing. Therefore, Plaintiff requests the Court set this matter to be heard on June 4, 2018, at 2:00 p.m. at the time scheduled for Plaintiff's Motion to Disallow Fees and Costs.

DATED May 24, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 24, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

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*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO DISALLOW COSTS AND  
FEES**

COMES NOW Defendant James A. Bevis (erroneously named "James E. Bevis"), by and through his counsel of record, Duke Scanlan & Hall PLLC, and submits this Response in Opposition to Plaintiff's Motion to Disallow Costs and Fees.

## **I. INTRODUCTION**

Mr. Bevis timely moved for an award of mandatory costs, discretionary costs, and attorney fees as the prevailing party. Mrs. Parkinson objected and filed a Motion to Disallow Costs and Fees, which should be denied because her pending Motion for Reconsideration does not provide a basis to decline an award of fees and costs. Furthermore, Mr. Bevis is entitled to the costs, both mandatory and discretionary, as outlined in his Memorandum in Support of Motion for Costs and Fees because they were actually and appropriately incurred in this case. A fee award under Idaho section 12-121 is appropriate here because Mrs. Parkinson's pursuit of this case was frivolous, unreasonable, and without foundation. Additionally, the time incurred and fees Mr. Bevis's counsel charged were reasonable.

## **II. LEGAL STANDARD**

A prevailing party is entitled to recover certain costs and fees. *See, e.g.*, I.R.C.P. 54 and Idaho Code § 12-121. To determine a prevailing party, I.R.C.P. 54(d)(1)(B) provides:

In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

“A determination on prevailing parties is committed to the discretion of the trial court and we review the determination on an abuse of discretion standard.” *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718–19, 117 P.3d 130, 132–33 (2005).

“An award of attorney fees pursuant to I.C. § 12–121 and I.R.C.P. 54(e)(1) will not be disturbed absent an abuse of discretion.” *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 629, 329 P.3d 1072, 1077 (2014) (analyzing former Idaho Code § 12-121). The

existence of a single triable issue of fact no longer prevents an award under Idaho Code section 12-121, and a trial court may apportion fees for those elements of a case that were frivolous, unreasonable, and without foundation. *Idaho Military Historical Soc'y*, 156 Idaho at 632, 329 P.3d at 1080 (“Apportionment of attorney fees is appropriate for those elements of the case that were frivolous, unreasonable, and without foundation.”)

### **III. ARGUMENT**

#### **A. Mrs. Parkinson’s pending Motion for Reconsideration does not provide a basis to decline to award fees and costs.**

Mrs. Parkinson argues that the Court should disallow all costs and fees due to her pending Motion for Reconsideration. (Plf.’s Brief in Supp. Of Mot. To Disallow Costs and Fees at 2.) If Mrs. Parkinson’s argument is adopted, Mr. Bevis would be put in the position of never being entitled to move for costs and fees. A party is obligated to submit its requests for costs and fees within 14 days of entry of a judgment. I.R.C.P. 54(d)(4). “A memorandum of costs prematurely filed is considered as timely.” *Id.*

Here, if the Court adopts Mrs. Parkinson’s argument that Mr. Bevis’s Motion for Costs and Fees was filed prematurely then, appropriately, denies Mrs. Parkinson’s Motion for Reconsideration, Mr. Bevis will not have another opportunity to move for costs and fees because the deadline under I.R.C.P. 54(d)(4) will have expired. Mr. Bevis timely moved for an award of costs and fees, and the issue is ripe to be heard and decided.

#### **B. Mr. Bevis is entitled to the costs, both mandatory and discretionary, as outlined in his Memorandum in Support of Motion for Costs and Fees.**

Mrs. Parkinson argues that Mr. Bevis’s photocopying fees were not extraordinary and therefore should not be allowed as discretionary costs. (Plf.’s Brief in Supp. Of Mot. To Disallow Costs and Fees at 2-4.) “A court may evaluate whether costs are exceptional within the

context of the nature of case.” *City of McCall v. Seubert*, 142 Idaho 580, 588, 130 P.3d 1118, 1126 (2006).

As the court instructed in *Seubert*, Mr. Bevis’s need to copy his entire file was exceptional because Mrs. Parkinson’s allegations against Mr. Bevis were broadly worded and encompassed every aspect of Mr. Bevis’s representation of Mrs. Parkinson in the underlying divorce matter even though briefing later established that Mrs. Parkinson was really focused on only a single communication. Due to Mrs. Parkinson’s broad allegations and the way her true claim became clear, it had been necessary for counsel to obtain and copy Mr. Bevis’s entire file to prepare the defense. Accordingly, he asks that his discretionary costs be awarded and Mrs. Parkinson’s Motion to Disallow those costs be denied.

**C. Mrs. Parkinson’s pursuit of this case was frivolous, unreasonable, and without foundation.**

Mrs. Parkinson argues that the Court found that her claim was valid—at least in terms of its form—which should preclude an award of fees under Idaho Code section 12-121. (Plf.’s Brief in Supp. Of Mot. To Disallow Costs and Fees at 4.) This Court determined that a client may sue her former attorney for breach of a fiduciary duty arising out of the attorney-client relationship, but “Plaintiff may not bring a claim for breach of a fiduciary duty against her attorney if the crux of her complaint is that her attorney did not provide adequate legal representation. In that event, the Plaintiff must pursue an action for professional negligence.” (Mem. Decision and Order Granting Def.’s Mot. To Dismiss at 24-25.)

Here, Mrs. Parkinson’s claim was never fairly debatable because the crux of her claim was always an alleged failure to provide adequate legal representation and she conceded that she suffered no damages caused by any alleged breach of fiduciary duty. (*See, e.g.*, Plf.’s Response in Opp’n to Def.’s Mot. To Dismiss 6 (“Admittedly, Bevis’s breach did not affect the substance

**DEFENDANT’S RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION TO DISALLOW COSTS AND FEES - 4**



of Parkinson's divorce, as the parties had already settled at the time of his emails. Instead, the breach impaired the value of Bevis's services.".) Mrs. Parkinson never distinguished her case from a legal professional negligence claim except in arguing that she should be exempt from proving the elements of professional negligence because of the form of recovery she sought. She offered no authority for the proposition that simply seeking a different form of damages could change the nature of the cause of action itself, and Idaho case law unequivocally discourages that concept. *See Doe v. Boy Scouts of Am.*, 159 Idaho 103, 105, 356 P.3d 1049, 1051 (2015) (the focus is not on the remedy sought or the type of damages, but on the source of the damages).

This Court noted the distinction between a professional negligence claim and an actionable breach of fiduciary duty claim:

To distinguish independently actionable breach-of-fiduciary-duty claims against lawyers from those that sound in negligence, Texas courts have generally held that a breach-of-fiduciary-duty claim focuses on "whether an attorney obtained an improper benefit from representing the client," while a negligence claim focuses on "whether an attorney represented a client with the requisite level of "Breach of fiduciary duty by an attorney most often involves the attorney's failure to disclose conflicts of interest, failure to deliver funds belonging to the client, placing personal interests over the client's interests, improper use of client confidences, taking advantage of the client's trust, engaging in self-dealing, and making misrepresentations."

(Mem. Decision and Order Granting Def.'s Mot. To Dismiss at 28-29.) Mrs. Parkinson had no basis to allege, and did not allege, that Mr. Bevis did anything to give rise to a claim for breach of fiduciary duty. Mrs. Parkinson did not allege that Mr. Bevis had a conflict of interest, that he stood to benefit himself by sharing her email with the other attorney, or that he lied to her in any way. From the start, it was clear that Mrs. Parkinson could not distinguish her claim from a cause of action for professional negligence. For that reason, Mrs. Parkinson pursued her action in violation of Idaho Code section 12-121, and an award of attorney fees is appropriate.

**D. Mr. Bevis's fees are reasonable.**

Mrs. Parkinson argues that Mr. Bevis's fees were not reasonable and identifies certain fees associated with the review and analysis of Mr. Bevis's file in the divorce matter. (Plf.'s Brief in Supp. Of Mot. To Disallow Costs and Fees at 5.) Mrs. Parkinson did not analyze the I.R.C.P. 54(e)(3) factors that this Court is required to consider in determining the amount of a fee award. She only argued that certain fees were unreasonable because Mr. Bevis's counsel did not need to analyze his file prior to a ruling on his I.R.C.P. 12(b)(6) motion. (*Id.*)

Mrs. Parkinson's argument that Mr. Bevis's counsel should not have analyzed his file until after the Court ruled on Mr. Bevis's Motion to Dismiss is inconsistent with the Idaho Rules of Professional Conduct. Rule 1.1 of the Idaho Rules of Professional Conduct requires attorneys to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Comments to Rule 1.1 provide:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.

I.R.P.C. 1.1 cmt. 5.

In this case, Mrs. Parkinson alleged that Mr. Bevis's representation of her began in 2011, that he shared confidential information, that he was complicit in securing a divorce that was more favorable for her husband, and that he failed to fully and adequately evaluate the true value of the substantial real property held by her marital community. (Compl. ¶¶ 2-6.) Mr. Bevis's

counsel could not provide competent representation in defending Mr. Bevis on these issues

**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO DISALLOW COSTS AND FEES - 6**

without some understanding of the documents in the underlying file. The time records Mr. Bevis's counsel submitted show that evaluation of the underlying file was done in an efficient, economical manner. Counsel relied on a paralegal, billing at a lower rate, to do an initial analysis of the materials so that attorney time spent digging through the thousands of pages of records in this matter would be minimized. The time spent would not be appropriate for a file that was smaller or in a case where the allegations were narrower, but here, the time was appropriate and was actually incurred. Additionally, counsel had to know what was in the records and understand the records in order to make its arguments and develop a case strategy. Mr. Bevis's counsel spent the time and effort necessary to understand the underlying file to competently represent Mr. Bevis in this matter, and accordingly, the fees were reasonable.

#### **IV. CONCLUSION**

For the reasons set forth herein, Mr. Bevis respectfully requests that this Court deny Mrs. Parkinson's Motion to Disallow Costs and Fees.

DATED this 25<sup>th</sup> day of May, 2018.

DUKE SCANLAN & HALL, PLLC

By Keely E. Duke

Keely E. Duke – Of the Firm

Aubrey D. Lyon – Of the Firm

*Attorneys for Defendant James A. Bevis*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 25<sup>th</sup> day of May, 2018, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

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*Attorneys for Defendant James A. Bevis*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**DEFENDANT'S OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
RECONSIDERATION**

COMES NOW Defendant James A. Bevis (erroneously named "James E. Bevis"), by and through his counsel of record, Duke Scanlan & Hall PLLC, and submits this Opposition to Plaintiff's Motion for Reconsideration.

**I. INTRODUCTION**

Plaintiff Rebecca Parkinson moved for reconsideration of this Court's 30-page Memorandum Decision and Order Granting Defendant's Motion to Dismiss ("Decision"). Mrs. Parkinson's Motion for Reconsideration should be denied because Mrs. Parkinson has not presented any new facts or new law to the Court in reconsideration – she is simply rearguing the

same facts and repeating the same arguments this Court already rejected. In addition, as this Court already ruled, Mrs. Parkinson's Motion for Reconsideration should be denied because the gravamen of her claim against Mr. Bevis is for professional negligence, and Mrs. Parkinson admits she cannot prove the required damages element to make that claim. (Plf.'s Brief in Supp. Of Mot. For Reconsideration at 3 ("Here, Parkinson cannot currently bring her fiduciary claim as a legal malpractice claim because she does not have 'objective proof in support of actual damages.'")) As such, under Idaho law, she has no actionable claim. *Taylor v. McNichols*, 149 Idaho 826, 845, 243 P.3d 642, 661 (2010) (damages is a required element of a professional negligence cause of action).

This Court has also previously, and correctly, rejected Mrs. Parkinson's policy arguments given they ignore clear Idaho authority that professional negligence, and not a breach of fiduciary duty, is the only cause of action she could attempt to bring against her former attorney.

This Court should also reject Mrs. Parkinson's argument that an amendment to her pleadings at some later date warrants the reversal of this Court's Decision to dismiss her case. No amendment that Mrs. Parkinson could make to her claims remedies her admission that she cannot prove actual damages. As such, given she cannot prove a required element of any professional malpractice claim, any amendment would be futile.

Mrs. Parkinson also suggests that if she gains Mr. Bevis' file through discovery, she may be able to support her claim for legal malpractice by amending her complaint to allege that Mr. Bevis failed to properly evaluate her property. In making this argument, Mrs. Parkinson vaguely alludes to the fact that "[she] anticipates that as she gets more information from Bevis's case file, that she will be able to substantiate her prior allegations, i.e., that Bevis was complicit with Stan Welsh, and that Bevis failed to properly evaluate her property. At that point, Parkinson intends

to amend her pleadings to address her potential malpractice claims.” (Plf.’s Brief in Supp. Of Mot. For Reconsideration at 3). This argument should be rejected because any claim that the settlement Mrs. Parkinson agreed to was not appropriate is clearly barred by the Idaho Supreme Court’s application of the doctrine of judicial estoppel in such a situation. *See McKay v. Owens*, 130 Idaho 148, 154, 937 P.2d 1222, 1228 (1997) (the doctrine of judicial estoppel precludes a party from entering a settlement, then repudiating the settlement to obtain a recovery against another party arising out of the same transaction). Accordingly, any such amendment would be futile. *See Carl H. Christensen Family Tr. v. Christensen*, 133 Idaho 866, 871, 993 P.2d 1197, 1202 (1999) (futility of amendment is a basis to deny a motion for leave to amend a pleading).

Mrs. Parkinson also alleges that she should be permitted discovery to obtain a copy of her legal file so that she may evaluate it to determine whether she believes there are potential breaches by Mr. Bevis. Again, however, Mrs. Parkinson has admitted that she did not sustain actual damages and, therefore, regardless of whether she finds additional alleged breaches of the standard of care by Mr. Bevis, further litigation would be futile because she cannot meet a required element of any professional malpractice claim – that she suffered some damage. *Id.*

Lastly, Mrs. Parkinson provides no authority as to why this case should be dismissed without prejudice.

## **II. LEGAL STANDARD**

“A motion to reconsider any order of the trial court entered before final judgment may be made at any time prior to or within 14 days after the entry of a final judgment.” I.R.C.P. 11.2(b)(1).

On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. However, a motion for reconsideration need not be supported by any new evidence or authority. When deciding the motion for reconsideration, the district

court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered. In other words, if the original order was a matter within the trial court's discretion, then so is the decision to grant or deny the motion for reconsideration.

*Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012) (internal citations omitted).

### **III. ARGUMENT**

#### **A. Mrs. Parkinson has not presented any new facts or new law to the Court in reconsideration.**

It is well-established in Idaho that if the gravamen of the claim against an attorney sounds in negligence, the only actionable claim the client has against her former attorney is one for professional negligence. *Bishop v. Owens*, 152 Idaho 616, 621, 272 P.3d 1247, 1252 (2012). The Idaho Supreme Court has also ruled that a client cannot prove a cause of action for legal professional negligence until “some damage” has occurred. *See Molen v. Christian*, 161 Idaho 577, 580, 388 P.3d 591, 594 (2017) (citing *Minnick v. Hawley Troxell Ennis and Hawley LLP*, 157 Idaho 863, 866–67, 341 P.3d 580, 583–84 (2015)). Mrs. Parkinson essentially argues that because this Court followed Idaho law, that she has been put “in a position where [her] recognized cause of action leaves her with no remedy at law or in equity” (Plf.’s Brief in Supp. Of Mot. For Reconsideration at 1), and that she is “in an irresolvable, legal catch-22.” (*Id.* at 4.) As such, Mrs. Parkinson argues that because she cannot prove professional negligence, then another cause of action must be available to her, even though Idaho has not recognized any such cause of action in a legal malpractice action where, as here, the gravamen of the claim is negligence. While unfortunate for Mrs. Parkinson, not all negligent acts are actionable. *See, e.g., Stem v. Prouty*, 152 Idaho 590, 596, 272 P.3d 562, 568 (2012) (summary judgment for



defendant-landlord affirmed where plaintiff-worker proved breach but failed to show that landlord's breach was the proximate cause of injury).

“A motion for reconsideration is a motion which allows the court—when new law is applied to previously presented facts, when new facts are applied to previously presented law, or any combination thereof—to reconsider the correctness of an interlocutory order.” *Johnson v. N. Idaho Coll.*, 153 Idaho 58, 62, 278 P.3d 928, 932 (2012). As this Court correctly concluded, the set of facts Mrs. Parkinson alleges is not actionable because, as discussed below, the gravamen of her claim is negligence and she cannot prove the necessary element of damages. (Decision at 28-30.) On reconsideration, Mrs. Parkinson argues for reconsideration because, she alleges, “the Court engaged in correctible misdirection” in its use of the legal principles she offered. (Plf.’s Brief in Supp. Of Mot. For Reconsideration at 1.) Mrs. Parkinson has not argued any new facts or any new law in an attempt to persuade the Court to reconsider its Decision. Rather, Mrs. Parkinson is simply rearguing the facts and repeating the arguments this Court previously rejected. As such, Mrs. Parkinson’s Motion for Reconsideration should be denied.

**B. This Court correctly ruled that Mrs. Parkinson’s facts do not give rise to a breach of fiduciary duty cause of action.**

This Court correctly decided that Mrs. Parkinson’s facts do not support a breach of fiduciary duty cause of action. (Decision at 29-30.) Mrs. Parkinson did not directly attempt to demonstrate how the facts she alleges are more similar to the type of facts giving rise to a breach fiduciary duty rather than legal professional negligence. Rather, she argues that because she cannot prove professional negligence, professional negligence cannot be the crux of her claim. (Plf.’s Brief in Supp. Of Mot. For Reconsideration at 6-7.) As this Court held, the appropriate focus in determining the crux of a cause of action is on the nature of the duty and how it was allegedly breached. (Decision at 21.) When determining the crux, or gravamen, of an action, the

Idaho Supreme Court looks to the nature of the duty and breach alleged, not whether the plaintiff can allege all of its elements. *See Conner v. Hodges*, 157 Idaho 19, 25, 333 P.3d 130, 136 (2014) (“We look to the complaint to determine ‘whether or not the gravamen of this action consists of a breach of the contract, itself, or the duty imposed by law in relation to the manner of its performance.’”).

Similarly, in *Bishop*, 152 Idaho at 621, 272 P.3d at 1252, the court analyzed the nature of the duty at issue in concluding that “this action is really a legal malpractice claim disguised as a contract claim. A person cannot change a tort action into a contract action simply by labeling it as such.” The client in *Bishop* was attempting to recharacterize her cause of action to get around a statute of limitations problem, just as here Mrs. Parkinson is trying to recharacterize her cause of action to get around a damages problem. *Id.* The court’s rationale in *Bishop* applies here: “the fact that a proponent labels his or her action as sounding in contract as well as malpractice does not make the underlying action contract. The ‘theory’ of relief sought is not different.” *Id.* Whether the plaintiff could prove all the elements of the professional negligence action was not a consideration in determining the gravamen of the claim. *See id.* Where there may be two causes of action for an alleged breach of a professional duty, the plaintiff may only pursue one cause of action which is for professional negligence. *Id.*

Mrs. Parkinson argues that the facts of her case are similar to the facts of *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2001) (“*Rockefeller I*”), and therefore should be actionable. The facts of *Rockefeller I* are dissimilar to the facts of this case, and the lack of similarities demonstrates why characterizing Mrs. Parkinson’s claim as “breach of fiduciary duty” is inappropriate. In *Rockefeller I*, a real estate broker sued landowners for his commission under an agreement to develop and market a residential development. The landowners filed a

counterclaim for damages arising from the broker's breach of the residential development agreement and violation of his fiduciary duties. The broker had been the landowners' development agent even before the agreement to develop and market the residential development. *Id.* at 642, 39 P.3d at 582. Facts came to light that that broker had been assisting a neighbor in a land dispute with the landowners while the residential development agreement was effective. *Id.* at 640, 39 P.3d at 580.

Primarily, *Rockefeller I* is unlike the matter before this Court because *Rockefeller I* did not address the interplay between a negligence cause of action and breach of fiduciary duty. The decision gives no indication that negligence was raised as an alternative cause of action, and the court was not presented with the question of determining the crux of a cause of action based on the nature of the duty and how it was allegedly breached. Additionally, unlike the facts of Mr. Bevis's representation of Mrs. Parkinson, in *Rockefeller I* the conduct at issue was an alleged conflict of interest. Conflicts of interest are of the type of breach of fiduciary duty which go beyond mere legal professional negligence. (Decision 29.) For these reasons, *Rockefeller I* does not assist in determining whether Mrs. Parkinson can bring a cause of action for breach of fiduciary duty where she alleges the gravamen of a legal professional negligence cause of action. Mrs. Parkinson has not alleged facts giving rise to a breach of fiduciary cause of action, and her Motion for Reconsideration should be denied.

**C. Mrs. Parkinson's policy considerations do not overcome Idaho authority that professional negligence is the appropriate cause of action here.**

Mrs. Parkinson argues that, notwithstanding the insufficiency of her factual allegations, she should be entitled to her day in court, her claim should be decided on the merits, and that the pleadings should be given liberal construction. (Plf.'s Brief in Supp. Of Mot. For Reconsideration at 5.) In her Response to Mr. Bevis's Motion to Dismiss, Mrs. Parkinson also

argued that she should be entitled to amend her Complaint so that her claim can be determined on the merits. (Plf.'s Resp. to Mot. To Dismiss at 7-8.) In support of her argument in the Motion for Reconsideration regarding getting her day in court, Mrs. Parkinson relied on *Houpt v. Wells Fargo Bank, Nat. Ass'n*, 160 Idaho 181, 188, 370 P.3d 384, 391 (2016), *reh'g denied* (Mar. 10, 2016). However, *Houpt* is not factually comparable because the discussion of the plaintiff getting her day in court arose in connection with an argument that the plaintiffs did not have standing due to a technical real-party-in-interest interpretation. The court was not considering an issue regarding whether a litigant should get her day in court when she cannot prove the elements of her cause of action, which is the issue here. Rules 12(b)(6) and 56 of the Idaho Rules of Civil Procedure make clear that a litigant does not get her day in court if she cannot prove all the elements of her claims.

Mrs. Parkinson also cited to *Bunn v. Bunn*, 99 Idaho 710, 712, 587 P.2d 1245, 1247 (1978), which is inapposite. The court in *Bunn* dealt with dismissal of an action based on a procedural technicality. The court acknowledged that "liberal construction" under Rule 1 is instructive on handling procedural technicalities, but it cannot alter compliance which is mandatory and jurisdictional. *Id.* The court in *Bunn* considered the effect of the appellant missing a deadline to pay a court reporter related to obtaining a copy of the record. *Bunn* is not helpful to Mrs. Parkinson because, here, Mrs. Parkinson has failed to satisfy the requirement that she be able to prove all the fundamental elements of her claim. This is not a technicality but is, rather, a fundamental aspect of Mrs. Parkinson's claim.

Mrs. Parkinson also refers the Court to an Idaho Supreme Court decision for the proposition that "[m]ere vagueness or lack of detail is not ground for a motion to dismiss." (Plf.'s Brief in Supp. Of Mot. For Reconsideration at 6.) This Court's ultimate decision to dismiss Mrs.

Parkinson's claims was not based on finding them vague. Rather, this Court considered the material Mrs. Parkinson offered and still found that she had failed to state a claim. (Decision at 28.) For these reasons, Mrs. Parkinson's policy considerations do not support the Court reconsidering its original decision.

**D. This Court has already considered the arguments raised by Mrs. Parkinson's persuasive authority, and they do not demonstrate that Mrs. Parkinson has a separate cause of action.**

Mrs. Parkinson argues that authority from Texas in the case *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999), supports her argument that she has a separate breach of fiduciary duty cause of action. (Plf.'s Brief in Supp. Of Mot. For Reconsideration at 8.) This Court, however, already considered this out-of-state authority, and after analyzing *Burrow* and more recent Texas decisions on breach of fiduciary duty, found that they support the conclusion that Mrs. Parkinson cannot "fracture" her professional negligence claim simply to reach a different form of recovery. (Decision at 21-24.)

Mrs. Parkinson offers decisions from other jurisdictions, including the Ninth Circuit Court of Appeals interpreting California law (*Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012) (considering attorney fees for attorneys operating under a conflict of interest)), Washington (*Eriks v. Denver*, 118 Wash. 2d 451, 824 P.2d 1207 (1992) (considering alleged conflict of interest)), and Minnesota (*Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982) (considering conflict of interest)). These cases all involved fee forfeiture associated with an attorney's conflict of interest, an issue not presented in Mrs. Parkinson's case. This Court noted that the negligence alleged here is not the form which would give rise to a breach of fiduciary duty action: "Here Plaintiff does not allege Defendant had a conflict of interest, that he stood to benefit himself by sharing her email with the other attorney, or that he lied to her in any way." (Decision at 29.)

Mrs. Parkinson's persuasive authority addressed factual considerations not at issue here, and her Motion for Reconsideration should be denied.

**E. Neither an amendment nor discovery are appropriate here.**

Mrs. Parkinson contends that, if she is allowed to amend her complaint, she will articulate a cause of action for breach of fiduciary duty that will leave no question as to the gravamen of her complaint. (Plf.'s Brief in Supp. Of Mot. For Reconsideration at 9-10.) She appears to refer to the proposed Amended Complaint attached as Exhibit A to her April 6, 2018 Motion to Amend. (*Id.*) Review of that Amended Complaint shows that it would not give rise to a cause of action for anything but professional negligence, which she concedes she cannot prove.

The proposed Amended Complaint focuses on the May 2015 exchanges in connection with Mrs. Parkinson wanting to disavow the divorce settlement which had been reached. (Proposed First Am. Compl.) She alleges that Mr. Bevis breached his professional duties by failing to maintain her confidences. (*Id.* at 4.) She acknowledges that "Bevis did not have any reason to send Welsh a copy of Parkinson's May 12, 2015 email, titled 'I am sick to my stomach,' or his other emails to Parkinson." (Proposed First Am. Compl. ¶ 25.)

This Court already considered these allegations in reaching its decision to grant Mr. Bevis's Motion to Dismiss. The conclusion this Court reached applies equally well to the proposed Amended Complaint:

She simply claims, essentially, that the rules of conduct that govern Defendant's profession precluded him from sharing her email without her permission and that he did so anyway. While Plaintiff has chosen to articulate that claim in the language of an action for breach of fiduciary duty, it is, at its essence, a claim that Defendant did not exercise the care his profession demands in handling her communications. That is a claim for professional negligence.

(Decision at 29.)

Mrs. Parkinson also suggests that if she gains Mr. Bevis' file through discovery, that she may be able to support her claim for legal malpractice by amending her complaint to allege that Mr. Bevis failed to properly evaluate her property. (Plf.'s Brief in Supp. Of Mot. For Reconsideration at 10-11.) In making this argument, Mrs. Parkinson vaguely alludes to the fact that "[she] anticipates that as she gets more information from Bevis's case file, that she will be able to substantiate her prior allegations, i.e., that Bevis was complicit with Stan Welsh, and that Bevis failed to properly evaluate her property. At that point, Parkinson intends to amend her pleadings to address her potential malpractice claims." (Plf.'s Brief in Supp. Of Mot. For Reconsideration at 3).

This argument should be rejected because any claim that the settlement Mrs. Parkinson agreed to was not appropriate is clearly barred by the Idaho Supreme Court's application of the doctrine of judicial estoppel in such a situation. *See McKay v. Owens*, 130 Idaho 148, 154, 937 P.2d 1222, 1228 (1997). The doctrine of judicial estoppel prevents Mrs. Parkinson from agreeing to settle her divorce action, obtaining the benefit of settlement, then repudiating her agreement, and by means of an inconsistent position seeking a recovery against Mr. Bevis arising out of the same transaction. Judicial estoppel applies where a litigant, by means of sworn statements, obtains a judgment, advantage or consideration from one party, the litigant will not thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or a right against another party, arising out of the same transaction or subject matter. *Id.* at 152, 937 P.2d at 1226.

In *McKay*, the client brought a legal malpractice action against her attorney arising from a medical malpractice action in which she had been a plaintiff and claimed that her attorney agreed to settle the underlying medical malpractice action without her consent. In a hearing on

the proposed settlement in the underlying medical malpractice matter, the client testified that she agreed with the settlement, and soon thereafter she signed a release agreement memorializing the settlement. Later, she sued her attorney alleging that her attorney settled the matter without her consent and that the amount of the settlement was insufficient. *Id.* at 151. The court held that the client had obtained an advantage (the settlement) from one party (the medical malpractice defendant), and that she could not subsequently repudiate her acceptance, and by means of her inconsistent positions, obtain a recovery against another party, arising out of the same transaction. *Id.* at 154.

In this case, Mrs. Parkinson is attempting the very conduct prohibited by the Idaho Supreme Court in *McKay*. She agreed to settle her divorce matter. (*See* Trout Decl. Jan. 30, 2018, Ex. A, Email correspondence re settlement.) She obtained the benefit of the settlement. (*See id.*) Now, related to the same transaction, she hopes to obtain a recovery from Mr. Bevis by repudiating her agreement to the process used in reaching the settlement. Accordingly, any such amendment would be futile. *See Carl H. Christensen Family Tr. v. Christensen*, 133 Idaho 866, 871, 993 P.2d 1197, 1202 (1999) (futility of amendment is a basis to deny a motion for leave to amend a pleading).

Mrs. Parkinson also alleges that she should be permitted discovery to obtain a copy of her legal file so that she may evaluate it to determine whether she believes there are potential breaches by Mr. Bevis. Again, however, Mrs. Parkinson has admitted that she did not sustain actual damages and, therefore, regardless of whether she finds additional alleged breaches of the standard of care by Mr. Bevis, further litigation would be futile because she cannot meet a required element of any professional malpractice claim – that she suffered some damage. *Id.*



Additionally, by this argument, Mrs. Parkinson tacitly concedes that she has no evidence of those alleged bad acts and is only speculating that they occurred. Speculation and the hope that a fishing expedition will turn up evidence of an unknown bad act is not sufficient to overcome the deficiency of Mrs. Parkinson's claim against Mr. Bevis, that is, that she cannot prove actual damages. *See Hall v. State*, 156 Idaho 125, 132, 320 P.3d 1284, 1291 (Ct. App. 2014) ("A court is not required to permit a petitioner to engage in 'fishing expedition' discovery because a post-conviction action 'provides a forum for known grievances, not an opportunity to research for grievances.'").

Mrs. Parkinson argues that she has no evidence that, besides an alleged unauthorized disclosure of an email, any wrongdoing happened. She hopes this Court will give her an opportunity to look for something that she can make a case out of, years after this matter was concluded. This argument is ultimately irrelevant, though, as she concedes that she was not damaged.

**F. The "with prejudice" designation should not be changed.**

Mrs. Parkinson requests that this Court dismiss her matter without prejudice instead of with prejudice because of her concern on the subsequent impact of a dismissal with prejudice. (Plf.'s Brief in Supp. Of Mot. For Reconsideration at 12.) Mrs. Parkinson does not support this argument with analysis of what makes a dismissal with or without prejudice appropriate. Generally, a dismissal with prejudice is appropriate when there has been an adjudication on the merits. *See King v. Lang*, 136 Idaho 905, 912, 42 P.3d 698, 705 (2002). Here, this Court's dismissal with prejudice was appropriate because it decided this matter on the merits—not just on what Mrs. Parkinson alleged, but also on what she could have alleged. (Decision at 30.) Mrs.

Parkinson has not offered argument or otherwise demonstrated why that determination was anything but correct.

#### **IV. CONCLUSION**

For the reasons set forth herein, Mr. Bevis respectfully requests that this Court deny Mrs. Parkinson's Motion for Reconsideration.

DATED this 29<sup>th</sup> day of May, 2018.

DUKE SCANLAN & HALL, PLLC

By /s/ Keely E. Duke  
Keely E. Duke – Of the Firm  
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#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 29<sup>th</sup> day of May, 2018, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**REPLY BRIEF IN SUPPORT  
OF MOTION FOR  
RECONSIDERATION**

I.R.C.P. 11.2

“How often misused words generate misleading thoughts.” — Herbert Spencer.

**REPLY ARGUMENTS**

**1. Bevis is Misusing Parkinson’s Arguments, Misleading the Court:**

Bevis is completely misusing Parkinson’s legal arguments—saying repeatedly that Parkinson has not presented any new law to the Court (*Def. Opp. to Motion for Reconsideration*, pp. 1-2, 3, 4-5, 13). This is an disingenuous statement for Bevis to make, considering that Bevis then cites to several of the new cases presented by Parkinson and tries to distinguish the new cases. Bevis also says that Parkinson is repeating the same arguments which the Court has already rejected (*Id.*, p. 2, 5). This is also patently misleading, considering that both Parkinson and the Court moved past the original arguments—the Court having acknowledged that Parkinson’s claim is valid, at least in theory. (*Memo-randum Decision*, p. 24). Bevis is the only one still discussing the original arguments. Obviously lacking a justified better approach, Bevis raises yet again reiterates only his original arguments (e.g., that Idaho only recognizes malpractice actions for legal clients, not breach of fiduciary duty actions), and

then argues the positions as if they were still relevant. This is a classic straw-man tactic: “A ‘straw man’...refers to an idea or argument that has no substance, but is set up so that it can be easily knocked down.” *Penate v. Wilshire Credit Corp.*, 2008 U.S. Dist. LEXIS 11346, \*1, 2008 WL 323617 (N.D. Cal. Feb. 1, 2008). The Court should reject such arguments as either irrelevant or as moot.

First, contrary to Bevis’s statements, Parkinson cites twenty (20) new cases or legal authorities on reconsideration which were not cited her prior brief, as seen in the following table:

No.	Citation (page #):	Purpose:
1	Restatement Second on Agency § 469 (2010) (p. 9).	Cited to illustrate that the general agency principles in <i>Rockefeller I</i> and persuasive case law support the principles in Restatement (Third) of Law Governing Lawyers § 37.
2	Black’s Law Dictionary, 10 <sup>th</sup> Ed. (p. 7).	Cited in response to the “crux” of the pleadings issue identified by the Court.
3	Beck v. Law Offices of Edwin J. Terry, Jr., P.C., 284 S.W.3d 416 (Tex. App. 2009) (p. 7).	Cited in response to the “crux” of the pleadings issue identified by the Court.
4	Bishop v. Owens, 152 Idaho 616, 620, 272 P.3d 1247, 1251 (2012) (p. 1, 2, 4, 5).	Cited in response to Court’s discussion of the case.
5	Bunn v. Bunn, 99 Idaho 710, 712, 587 P.2d 1245, 1247 (1978) (p. 5).	Cited in support of Idaho’s policy against technical dismissals.
6	Eriks v. Denver, 118 Wash. 2d 451, 462, 824 P.2d 1207, 1213 (1992) (p. 9).	Cited in support of policy for attorney fee disgorgement for breach of ethical duties.
7	Fragnella v. Petrovich, 153 Idaho 266, 276, 281 P.3d 103, 113 (Idaho June 21, 2012) (p. 2).	Cited in reference to Idaho’s policy of applying the same standards of decision on a motion for reconsideration.
8	Hendry v. Pelland, 315 U.S. App. D.C. 297, 73 F.3d 397, 402 (D.C. Cir. 1996) (p. 8).	Cited in support of the principle that an attorney forfeits his compensation for breach of ethical duties, and that the client need not prove actual harm or damages.
9	Haupt v. Wells Fargo Bank, Nat’l Ass’n, 160 Idaho 181, 188, 370 P.3d 384, 391 (2016) (p. 5).	Cited in support of Idaho’s policy for deciding cases on their real merits.
10	Huber v. Taylor, 469 F.3d 67, 77 (3d Cir.	Cited in support of the principle that a client

	2006) (p. 9).	need not prove actual damages to obtain a forfeiture of attorney fees; additional discussion of persuasive case law on the issue.
11	Johnson v. N. Idaho College, 153 Idaho 58, 62, 278 P.3d 928, 932 (Idaho May 31, 2012) (p. 2).	Cited in reference to Idaho’s standards for reconsideration, which allows the Court to consider new facts or new law, or both.
12	Rice v. Perl, 320 N.W.2d 407, 411 (Minn. 1982) (p. 9).	Cited in support of the principle that an attorney forfeits his compensation for breach of fiduciary duties.
13	Rodriguez v. Disner, 688 F.3d 645, 655 (9th Cir. 2012) (p. 9).	Cited in support of the principle that an attorney forfeits his compensation for breach of ethical duties.
14	Smith v. Marley, 39 Idaho 779, 780, 230 P. 769, 769, 1924 Ida. LEXIS 98, *1 (Idaho 1924) (p. 10).	Cited in reference to Idaho’s standard for assuming the truth of the plead allegations in a dismissal context.
15	Sohn v. Foley, 125 Idaho 168, 172-73, 868 P.2d 496, 500-01 (Ct. App. 1994) (p. 3).	Cited in reference to Idaho’s standards for proving actual damages in a legal malpractice case.
16	State v. Peregrina, 151 Idaho 538, 550, 261 P.3d 815, 827, 2011 Ida. LEXIS 129, *42 (Idaho 2011) (p. 10).	Cited in reference to Idaho’s standard for assuming the truth of the plead allegations in a dismissal context.
17	Stuard v. Jorgenson, 150 Idaho 701, 712, 249 P.3d 1156, 1167 (2011) (p. 3).	Cited in reference to Idaho’s standards for proving actual damages in a legal malpractice case.
18	Viehweg v. Thompson, 103 Idaho 265, 268, 647 P.2d 311, 314 (Ct. App. 1982) (p. 12).	Cited in reference to Idaho’s policy regarding statutes of limitations and asserting claims defensively as an offset claim.
19	Wackerli v. Martindale, 82 Idaho 400, 404, 353 P.2d 782, 784 (1960) (p. 6).	Cited in reference to Idaho’s policy against dismissal for mere vagueness.
20	Wellman v. Butler Area Sch. Dist., 877 F.3d 125, 132 (3d Cir. 2017) (p. 7).	Cited in response to the “crux” of the pleadings issue identified by the Court.

This table of new authorities is significant because Parkinson only cited nineteen (19) legal authorities in her original brief on dismissal. That means that Parkinson increased her legal authorities by more than 100% from those in her prior brief. This figure does not include Parkinson’s renewed discussion of her prior authorities, e.g., *Rockefeller I*, *Restatement (Third) of the Law Governing*

*Lanyers* § 37, *Burrow v. Arve*, *Harper v. Harper*, etc. Bevis's repeated statement about lack of new authority is either irresponsible, or purposefully misleading, or both. Bevis's strong emphasis on the point suggests more than mere hyperbole and seems to cross the boundary of candor toward this tribunal in not making false statements. See Idaho R. Prof. C. 3.3(a)(1).

Importantly and of significance, Bevis destroys his own argument about lack of new authorities by attempting, without success, to distinguish some of the new authorities in his opposition brief. (*Def. Opp. to Motion for Reconsideration*, pp. 7-9). But even if Bevis's argument about new authority was correct, Bevis ignores the fact that Parkinson is entitled to argue the same authorities as before if she feels that the Court misapplied those authorities: "[Idaho Supreme Court authority] does not state that a trial court cannot reconsider its own interlocutory orders for facial errors or errors of law." *Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Ct. App. 2006). This same reasoning goes for the alleged lack of new facts: "In our view, the case law applying Rule 11(a)(2)(B) permits a party to present new evidence when a motion is brought under that rule, but does not require that the motion be accompanied by new evidence." *Id.* The Court can safely disregard Bevis's position that Parkinson does not legally support her motion.

Second, Parkinson is not simply repeating her prior legal arguments. Rather, Parkinson is asking the Court to apply the facts alleged in her new complaint to the acknowledged case law. The Court has already decided that Parkinson's breach of fiduciary duty claim is theoretically sound: "This Court concludes Plaintiff may sue her former attorney for breach of a fiduciary duty arising out of the attorney-client relationship, just like other principals may sue their agents who owe them a fiduciary duty. The test articulated by the Idaho Supreme Court in *Rockefeller I* and in the Restatement (Third) of the Law Governing Lawyers is applicable to those claims." (*Memorandum Decision*, p. 24). Parkinson is addressing what she feels is the Court's misapplication of the claim in a Rule 12 context. (See *Legal Brief in Support of Reconsideration*, pp. 6-9, 9-10). Ignoring all this, Bevis tries to take the issue back to square one and says: "This Court has...previously, and correctly, rejected Mrs. Parkinson's policy arguments given they ignore clear Idaho authority that professional negligence, and not a breach of fiduciary duty, is the only cause of action she could attempt to bring against her

former attorney.” (*Def. Opp. to Motion for Reconsideration*, p. 2). This statement is simply false. Even if the Court felt that Parkinson’s fiduciary duty claim was really a malpractice claim (*Memorandum Decision*, pp. 28-29), that is not to say that there is only one available claim. Bevis may think that Parkinson’s facts do not support the fiduciary duty claim, but that is a different issue from whether Parkinson has alleged the claim to begin with. It seems most telling that Bevis asks the Court to decide the merits of Parkinson’s alleged claim at this stage of the case; when in reality he can only ask to challenge the sufficiency of her pleadings and whether her claim, if proven, entitles her to relief.<sup>1</sup> (See *Savage v. Scandit Inc.*, discussed in next section).

Third, Parkinson is not trying to “get around a damages problem,” as Bevis suggests. (*Def. Opp. to Motion for Reconsideration*, p. 6). Parkinson makes it clear that the whole discussion about damages is really a moot point until discovery is complete on the issue. (*Legal Brief in Support of Reconsideration*, pp. 10-11). It is disingenuous and a bit perverse for Bevis to blame Parkinson for the alleged damages problem when he is the one who has caused the problem by improperly withholding the case file and other relevant information. (*Id.*). Parkinson’s amended pleadings, taken as true, are enough to warrant discovery on the issue: “...Parties may obtain discovery regarding any nonprivileged matter that is relevant to [the] party’s claim.” I.R.C.P. Rule 26(b)(1)(A). One need not speculate to understand why it is that Bevis doesn’t want to disclose the file to his client.

## **2. Rockefeller I Support’s Parkinson’s Breach of Fiduciary Duty Claim:**

Bevis makes the puzzling statement that *Rockefeller I* is distinguishable because it involved a “conflict of interest,” and that the case’s holdings do not apply because “...Conflicts of interest are of the type of breach of fiduciary duty which go beyond mere legal professional negligence.” (*Def. Opp. to Motion for Reconsideration*, p. 7). If anything, Bevis’s distinction supports Parkinson’s own position on the need for legal clients to be able to seek a remedy for a distinctly ethical breach outside of

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<sup>1</sup> Bevis makes the unwarranted statement that: “Mrs. Parkinson did not directly attempt to demonstrate how the facts she alleges are more similar to the type of facts giving rise to a breach fiduciary duty rather than legal professional negligence.” (*Opposition Brief*, p. 5). Parkinson does not have a duty to “directly” make that kind of comparison. Parkinson has leeway under I.R.C.P. 8 to allege her claim in the form she thinks is most appropriate. She does not have to make a preemptory showing—in her pleadings or otherwise—that one form is better than another. In any event, the Court has already acknowledged Parkinson’s claim as being theoretically valid.

a normal legal malpractice action. Of course, this discussion is a moot point because the Court has already found that *Rockefeller I* gives the necessary criteria for an Idaho breach of fiduciary action by clients against their attorneys. (*Memorandum Decision*, p. 24).

### **3. Parkinson is Entitled to Amend Her Pleadings:**

Parkinson is entitled to amend her pleadings to better state her claims. Bevis ignores this and makes another misleading statement to the Court about Idaho pleading standards: “Mrs. Parkinson has failed to satisfy the requirement that she be able to prove all the fundamental elements of her claim.” (*Def. Opp. to Motion for Reconsideration*, p. 8). That is not the Idaho pleadings standard. Parkinson does not have to “prove” the elements of her claim in a Rule 12 context. In the recent case *Savage v. Scandit Inc.*, No. 45143, 2018 Ida. LEXIS 108 (May 1, 2018), the Idaho Supreme Court confirmed that Rule 12 dismissal is not proper if the pleadings contain facts which, if proven, would constitute a tri-able claim. There, Savage claimed that her employer, Scandit, had breached the Idaho Wage Claim Act by withholding certain commissions and bonuses. Scandit responded by saying that these items were not yet earned at the time Savage had filed her complaint. Scandit then filed a Rule 12(b)(6) motion to dismiss, and the District Court granted the motion. On appeal, the Supreme Court reversed and remanded. The Supreme Court noted the key question in such cases is “...whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief. In doing so, the Court draws all reasonable inferences in favor of the non-moving party.” *Id.*, at p. \*5. The Court found that the allegations stated in Savage’s complaint, i.e., that she had already earned the wage items, together with reasonable inferences in Savage’s favor, were enough to defeat Scandit’s dismissal motion. The Court also found that the question of whether Savage would ultimately prevail on her wage claims was immaterial in a dismissal context: “While Scandit may be able to show later that the deal was not formally booked or that there were contingencies that prevented the booking, for purposes of a motion to dismiss pursuant to Idaho Rule of Civil Procedure 12(b)(6) Savage has stated a claim under the Idaho Wage Claim Act.” *Id.*, at p. \*10. Finally, the Supreme Court found that Savage’s proposed amendments were not futile “...Because



the amended complaint contained facts alleging the commission was due and owing at the time Savage sought leave to amend.” *Id.*, at p. \*13.

In our case, Bevis is pushing the Court to uphold the same reversible errors as found in the *Savage v. Scandit* case. For instance, Bevis is asking the Court to go beyond identifying the presence of viable claims and is asking the Court to test the merits of those claims. Bevis is also pushing the Court to reject the proposed amendments because they are not yet fully proven. In sum, Bevis is asking the Court to put the evidentiary cart before the minimal pleadings horse. Doing so is a clear legal error and, as seen in *Scandit*, is a reversible error if not corrected on reconsideration.

#### **4. Parkinson’s Proposed Amendments Are Not Futile or Barred by Estoppel:**

Bevis says that Parkinson’s amendments would be futile based on Parkinson’s divorce settlement. (*Def. Opp. to Motion for Reconsideration*, p. 12). However, Parkinson says in her amendments that the breach of fiduciary duty claim is centered on conduct which happened after the settlement, i.e., Bevis’s needless breach of Parkinson’s confidences to Stan Welsh, and so estoppel principles do not apply. In any event, this is a fact-centered issue, and if Bevis wants to argue judicial estoppel, he must answer the complaint, be subject to discovery, and address the issue in summary judgment or at trial. Bevis cannot refuse to make a responsive pleading and then ask the Court to construe the pleadings his favor. Under Rule 12, the Court can only construe the pleadings in Parkinson’s favor. There is nothing in Parkinson’s pleadings or amendments (the only relevant documents at this point in the case) to suggest that the amendments are futile under the *McKay v. Owens* standards, or otherwise.

#### **5. Parkinson Supported Her “Without Prejudice” Arguments:**

Bevis makes an additional misleading statement that Parkinson does not provide the Court with any legal authority to change its existing order to a dismissal without prejudice. (*Def. Opp. to Motion for Reconsideration*, p. 13). Bevis then concludes: “This Court’s dismissal with prejudice was appropriate because it decided this matter on the merits.” (*Id.*). For this same reason, i.e., the “merits” of the claim, the Court has power to change its prior order. Parkinson is asking the Court to reconsider the “merits” of her claim. If for some reason the Court declines to do so, the Court should

find that Parkinson has the parallel right to discuss the merits of her claim in any future collection actions by Bevis. Parkinson provided extensive argument and legal authority to substantiate the “merits” of her claim in this action, together with legal authority on her rights to assert the claim defensively in the future.

**6. The Court Should Allow Further Amendments:**

If the Court finds that Parkinson’s amendments are still somehow deficient, the Court should highlight the deficiencies and allow Parkinson a reasonable time in which to cure them. The Court should abandon Bevis’s flawed and simply incorrect arguments about Idaho dismissal standards.

**CONCLUSION**

The Court should vacate its dismissal order and allow the claim to proceed on its merits. The Court should allow further amendments, as needed.

DATED May 31, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 31, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

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[ked@dukescanlan.com](mailto:ked@dukescanlan.com)

iCourt



Aubrey D. Lyon  
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/s/ Kim J. Trout  
Kim J. Trout

KIM J. TROUT, ISB #2468  
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Attorney for the Plaintiff.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-08744

**REPLY BRIEF IN SUPPORT  
OF MOTION TO DISALLOW  
COSTS AND FEES**

I.R.C.P. 54

**REPLY ARGUMENTS**

**1. Bevis Misstates the Basis of Parkinson's Motion to Disallow Costs and Fees:**

Bevis misstates the basis for Parkinson's motion to disallow fees and costs. Bevis says: "Here, if the Court adopts Mrs. Parkinson's argument that Mr. Bevis's Motion for Costs and Fees was filed prematurely then, appropriately, denies Mrs. Parkinson's Motion for Reconsideration, Mr. Bevis will not have another opportunity to move for costs and fees because the deadline under I.R.C.P. 54(d)(4) will have expired." (*Def. Response in Opp. to Motion to Disallow Costs and Fees*, p. 2). Parkinson never makes that argument, i.e., that Bevis's motion was procedurally premature. In fact, Parkinson never mentions, or even hints at, the concept of the filing maturity. Rather, Parkinson argues that the Court should not award fees and costs because the case was dismissed on substantive errors and should be reinstated for additional proceedings. (*Legal Brief in Support of Motion to Disallow*, p. 2).

Bevis says: “Here, Mrs. Parkinson’s claim was never fairly debatable because the crux of her claim was always an alleged failure to provide adequate legal representation and she conceded that she suffered no damages caused by any alleged breach of fiduciary duty.” (*Def. Response in Opp. to Motion to Disallow Costs and Fees*, p. 4). This argument is flawed for at least three reasons: (1) the Court acknowledged that Parkinson’s claim was theoretically sound (*Memorandum Decision*, p. 24); (2) the Court admitted that it had a difficult time reaching its conclusions about the claim (*Memorandum Decision*, pp. 28-29); and (3) the Court’s memorandum reflects that Parkinson was asking for a good-faith extension of Idaho case law in her favor. (See *Memorandum Decision*, generally). In sum, Parkinson’s claim involved a fairly debatable question of law, and so Bevis is not entitled to Idaho Code § 12-121 fees: “Where questions of law are raised, we have held that attorney fees should be awarded under I.C. § 12-121 only if the position advocated by the nonprevailing party is plainly fallacious and, therefore, not fairly debatable.” *Assocs. Nw. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987).

## **2. Bevis’s Document Review Fees Were Not Reasonable:**

To re-emphasize, Parkinson objects to all Bevis’s fees—even those associated with Bevis’s Rule 12 defense. (*Legal Brief in Support of Motion to Disallow*, pp. 5-6). By making arguments on reasonableness, Parkinson does not concede that any of Bevis’s fees are warranted under Idaho Code § 12-121. (*Id.*). With that fact in mind, the Court should find that Bevis’s document review fees, even if awardable, were not reasonably incurred. Bevis says that his “...counsel had to know what was in the [divorce] records and understand the records in order to make its arguments and develop its case strategy.” (*Def. Response in Opp. to Motion to Disallow Costs and Fees*, p. 7). This argument, even if true, is not factually supported by counsel’s affidavit. See I.R.C.P. 54(e)(5), which says: “A claim for attorney fees as costs must be supported by an affidavit of the attorney stating the basis and method of computation.” As stated in prior briefing, Bevis fails to explain why this effort was necessary prior to the resolution of his Rule 12 motion—which did not focus on the contents of the divorce file but on the form of Parkinson’s causes of action. (*Legal Brief in Support of Motion to Disallow*, pp. 5-6).

In addition, Bevis says: “The time spent would not be appropriate for a file that was smaller or in a case where the allegations were narrower, but here, the time was appropriate and was actually incurred.” (*Def. Response in Opp. to Motion to Disallow Costs and Fees*, p. 7). Parkinson fails to see why a smaller file review would have been inappropriate while a larger file review—spanning dozens of hours and thousands of dollars—was somehow appropriate. Any major file review was largely superfluous to Bevis’s Rule 12 arguments about the form of Parkinson’s claims.

### **CONCLUSION**

The Court should disallow all Bevis’s fees and costs. In the alternative, the Court should only award Bevis his mandatory filing fee cost and disallow all fees under Idaho Code § 12-121.

DATED May 31, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 31, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

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[ked@dukescanlan.com](mailto:ked@dukescanlan.com)

iCourt



Aubrey D. Lyon  
[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

/s/ Kim J. Trout  
Kim J. Trout

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Rebecca Parkinson  
Plaintiff,  
vs.  
James Bevis  
Defendant.

Case No. CV01-17-08744

COURT MINUTES

Event Code: CMIN

JUDGE: Jonathan Medema  
CLERK: Janet Ellis  
REPORTER: Penny Tardiff

DATE: June 4, 2018 TIME: 2:00 PM  
COURTROOM: 502

**APPEARANCES:**

Counsel for Plaintiff(s): Kim Jay Trout  
Counsel for Defendant(s): Keely Elizabeth Duke

<a href="#">01:54:32 PM</a>	Court	called Rebecca Parkinson vs James Bevis CV01-17-8744, time set for Motion to Reconsider and Motion for Atty Fees and Costs
<a href="#">01:55:11 PM</a>	Keely Duke	counsel for defendant
<a href="#">01:55:21 PM</a>	Kim Trout	counsel for plaintiff
<a href="#">01:56:04 PM</a>	Court	has read the briefing, inquired if any add'l argument
<a href="#">01:56:17 PM</a>	Mr. Trout	regarding the Motion to Reconsider, Need to distinguish Bishop. Argues Savage. Request Court reconsider
<a href="#">02:04:56 PM</a>	Ms. Duke	argued in opposition. No basis for Court to reconsider, Savage case argued first time today, does not change anything.
<a href="#">02:09:20 PM</a>	Mr. Trout	response believe the Court could allow to go forward.
<a href="#">02:13:56 PM</a>	Court	In the Court's view, lawyers can act in a fiduciary duty. Court concluded in original decision as Court reads Bishop, Supreme Court takes position in regulating. If don't have actual damages, don't have a claim. As to this motion, Court will get subsequent ruling to the parties. Court will rule on the fees as well.
<a href="#">02:17:54 PM</a>	Mr. Trout	regarding fees, fundamental opposition to the fees claims, no showing case was filed frivolously, copying charges were extraordinary in this case. Request Court deny.
<a href="#">02:19:46 PM</a>	Ms.	Mr. Trout focuses on 12-2121.

	Duke	
<a href="#">02:20:33 PM</a>	Court	will get a written decision on both.
<a href="#">02:20:49 PM</a>	Mr. Trout	inquired if Court would be addressing the Motion to amend.
<a href="#">02:21:06 PM</a>	Court	will include
<a href="#">02:21:11 PM</a>	END CASE	

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-8744

**ORDER DENYING MOTION TO  
RECONSIDER**

Plaintiff moves this Court pursuant to Idaho Rule of Civil Procedure 11.2 to reconsider its order granting Defendant's motion to dismiss Plaintiff's claim for breach of fiduciary duty. For the reasons stated herein, the Court declines to reconsider its earlier decision. The motion to reconsider is denied.

Plaintiff claims that Defendant, her former attorney during her divorce proceedings, breached a duty he owed to her as a result of that relationship: a duty to keep her communications with him in confidence. Plaintiff concedes that she cannot show any economic damages as a result of this alleged breach, but she wishes to pursue the equitable remedy of fee disgorgement available to principals whose fiduciary breaches a duty owed to the principal. The Court will not restate the reasons it concluded Plaintiff cannot bring that claim under Idaho law. Those are set forth in the Court's Memorandum Decision and Order Granting Defendant's Motion to Dismiss. The Court will simply address arguments raised by Plaintiff in her motion to reconsider.

Plaintiff argues this Court was correct in concluding that under existing Idaho Supreme Court precedent a client may sue her lawyer for a claim of breach of a fiduciary duty if the client could not bring the claim as being one for professional negligence. Plaintiff argues this Court erred in dismissing her claim for breach of fiduciary duty

**ORDER DENYING MOTION TO RECONSIDER - 1**



because she cannot bring her suit as a professional negligence claim because she cannot prove damages as a result of any breach by her lawyer. She seeks only the equitable remedy of fee disgorgement. Plaintiff argues this Court erred in not recognizing that she cannot bring her claim as a claim for professional negligence. She argues that it is precisely because she cannot bring her claim as one for professional negligence that she should be permitted to bring it as one for breach of a fiduciary duty.

This Court understood this argument originally. The Court will attempt to clarify its earlier ruling. In this Court's view, the Idaho Supreme Court in *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012) adopted a rule unique to cases where lawyers are defendants. The Court held that "Bishop's breach of contract claim, which asserts the same claim as the legal malpractice theory, which has traditionally been treated as the proper claim, fails to state a claim upon which relief can be granted." *Id.* at 623, 272 P.3d at 1254. That holding is unique to that case and to the wording of Ms. Bishop's claim. It is not binding on this Court. However, in the majority opinion and the concurring opinion of Justice Jim Jones, the Court articulated a rationale behind the holding in that case. As this Court reads the opinions in *Bishop*, the majority concluded that if you are going to sue your lawyer and allege that your lawyer breached one of the ethical rules imposed by the Idaho State Bar Association and the Idaho Supreme Court on lawyers in Idaho, you may only do so in an action for professional negligence. That means you have to prove damages. Plaintiff here concedes she cannot.

As this Court explained in its original decision, this Court is not persuaded the holding of *Bishop* necessarily extends quite that far, but it is a fair summary of the rationale expressed. For example, in this Court's view, a client may bring a claim for breach of a fiduciary duty in Idaho alleging that her lawyer provided competent legal services to her, but breached Idaho Professional Rule of Conduct 1.8 by acquiring a pecuniary interest adverse to her interests. However, if the client's claim, as in *Bishop*, is that the adequacy of the legal services provided by the lawyer fell below the standard of care set by the profession, the client must bring that claim as one for professional

negligence. In *Bishop*, the plaintiff alleged the lawyer failed to advise her<sup>1</sup> of the operation of a particular statute that might affect her ability to recover monies. She argued that her lawyer had a duty to advise her of how this statute might affect her in the future. She argued that duty arose not only from the standards of the legal profession, but also from the language of her specific contract with her lawyer, the defendant.

The Supreme Court held that her personal representative could not pursue the claim for professional negligence because, at the time her complaint arose, claims in tort abated upon the death of the claimant. *Id.* at 620; 272 P.3d at 1250. Contract claims, however, generally survive the death of one of the parties to the contract. Nonetheless, the Idaho Supreme Court held her representative could not recover in contract based upon her attorney's bad advice because the standard of care in the contract was essentially the same as the standard of care required by the professional standards of the legal profession. Where the duty she alleged her lawyer breached was essentially the same under the rules of professional conduct for lawyers and the contract she had with her lawyer individually, the Court held she could not bring her claim for breach of contract, because such claims "traditionally" are characterized as claims for professional negligence. *Id.* at 621; 272 P.3d at 1252.

Plaintiff's claim in this case is essentially indistinguishable from the situation in *Bishop*. The plaintiff in *Bishop* alleged her lawyer violated a rule of his profession related to the competency of his services. She could not bring a claim in professional negligence because she died. Therefore, she sought to bring the claim in contract. The *Bishop* majority refused to allow her to do so, despite the fact her estate was left without a remedy.

In this case, Plaintiff claims her lawyer breached Idaho Rule of Professional Conduct 1.6 which imposes on the lawyer a duty to keep certain information relating to the lawyer's representation of the client confidential. She claims her lawyer disclosed this to her adversary in the court proceedings. She cannot bring a suit in professional negligence because she cannot prove she suffered any damages due to this act. However, she wishes to bring a suit in equity seeking fee disgorgement. This Court believes the majority's

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<sup>1</sup> The Plaintiff Lois Bishop was suing as the personal representative of Patricia Shelton, who died while the action was pending in the trial court. This Court's references to "she" are a reference to Ms. Shelton.

rationale in *Bishop* applies equally to Plaintiff's claim in this case. Her claim is related to the adequacy or competency of the work Defendant performed on her behalf. If the Supreme Court would not permit the plaintiff in *Bishop* to pursue a claim in contract under those circumstances, this Court concludes the Supreme Court would not permit the Plaintiff here to pursue her claim in equity. This is what this Court was attempting to say when it discussed remedies in its original decision.

Plaintiff complains there are many policy reasons she ought to be permitted to bring her equitable claim. This Court understands and agrees. In its original decision, this Court cited to various scholarly articles presenting varied approaches to the policy issues at play. This Court simply reads the majority and concurring opinions in *Bishop* as making a policy decision about what kinds of suits the Supreme Court will permit clients to bring against their lawyers.

To be candid, this Court disagrees with the majority in *Bishop*. This Court finds the dissenting opinion to be more persuasive. However, the Idaho Supreme Court obviously has supervisory authority over the trial courts. This includes the authority to decide what types of actions in equity the Idaho courts will recognize. The Supreme Court also has a supervisory function over the legal profession, and deciding how to permit clients to seek redress from wrongs they allege they have suffered at the hands of their lawyers is part of that function. This Court is not free to ignore the Supreme Court's policy decisions simply because this Court disagrees with them.

This Court acknowledges that the decision in *Bishop* does not squarely address the issue presented here. However, as best this Court can discern from *Bishop*, the Idaho Supreme Court has made a policy decision that lawyers are different. Defendant argues that *Bishop* held any suit claiming a breach of any duty arising from the attorney-client relationship must be brought as a claim for professional negligence. There is certainly language in *Bishop* that supports that argument. This Court is not convinced the majority in *Bishop* intended to adopt such a sweeping prohibition against clients suing their former lawyers. However, the language of Justice Jones' concurring opinion says that if the duty alleged to have been breached is a duty established by the Idaho Rules of Professional Conduct for lawyers, the client must bring the suit in negligence. *See id.* at 623; 272 P.3d

**ORDER DENYING MOTION TO RECONSIDER - 4**

at 1254 (“Since the alleged breaches of duty for which [the client] sued [her lawyer] are duties emanating from the I.R.P.C., the action is tort in nature.”). Here Plaintiff’s claim is not in tort; it is in equity. She cannot pursue a claim in tort because she cannot prove damages. Absent more clear direction from the Supreme Court about the extent of its holding in *Bishop*, this Court feels compelled to conclude Plaintiff may not bring her claim in the Idaho courts.

This does not mean Plaintiff is without an avenue to redress what she calls her attorney’s unethical conduct. Plaintiff may complain to the Idaho Bar Association. That body has the power, if it chooses to do so, to sanction her attorney; including the sanction of requiring him to disgorge fees he was paid. From the arguments of the lawyers in this case, the Court infers Plaintiff has tried that route and has come away dissatisfied with the results. Whatever the case may be, this Court felt, and still feels, compelled by the decision in *Bishop* to dismiss Plaintiff’s claim because it fails to state a claim upon which this Court could grant relief. Not because of the remedy sought; but because of the duty she alleges was breached.

The motion to reconsider is DENIED.

IT IS SO ORDERED.

Signed: 7/3/2018 02:44 PM

  
\_\_\_\_\_  
JONATHAN MEDEMA  
District Judge

**ORDER DENYING MOTION TO RECONSIDER - 5**

000248

CERTIFICATE OF MAILING

I hereby certify that on July 5, 2018, I served a true and correct copy of the within instrument as follows:

Kim J. Trout  
TROUT LAW, PLLC  
ktrout@trout-law.com

☐ U.S. Mail, Postage Prepaid  
☐ Interdepartmental Mail  
☒ Electronic Mail  
☐ Facsimile

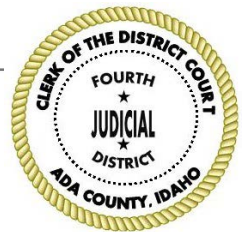
Keely E. Duke  
Aubrey D. Lyon  
DUKE SCANLAN & HALL, PLLC  
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[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

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CHRISTOPHER D. RICH  
Clerk of the District Court

Signed: 7/5/2018 11:03 AM

By: Janet Ellin  
Deputy Court Clerk



**ORDER DENYING MOTION TO RECONSIDER - 6**

000249

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-8744

**ORDER DENYING MOTION TO  
AMEND THE COMPLAINT**

After this Court entered judgment dismissing her claim pursuant to I.R.C.P. 12(b)(6), Plaintiff filed a motion to amend her complaint. In her motion, Plaintiff asserts this Court dismissed her complaint for defects in her pleading and that she has remedied those defects in her proposed amended complaint. While this Court discussed the language of the complaint in its decision regarding the motion to dismiss, this Court did not grant the motion due to defects in Plaintiff's use of language. This Court granted the motion because, considering all the evidence presented at the motion hearing, this Court concluded Plaintiff simply cannot establish facts that would entitle her to relief in the Idaho courts. The Court explained its reasoning for that conclusion in its decision granting Defendant's motion to dismiss and its decision denying Plaintiff's motion to reconsider. The Court will decline to do so again here. The motion to amend is DENIED.

IT IS SO ORDERED.

Signed: 7/3/2018 02:44 PM

  
\_\_\_\_\_  
JONATHAN MEDEMA  
District Judge

**ORDER DENYING MOTION TO AMEND THE COMPLAINT - 1**

CERTIFICATE OF MAILING

I hereby certify that on July 5, 2018, I served a true and correct copy of the within instrument as follows:

Kim J. Trout  
TROUT LAW, PLLC  
ktrout@trout-law.com

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Aubrey D. Lyon  
DUKE SCANLAN & HALL, PLLC  
[ked@dukescanlan.com](mailto:ked@dukescanlan.com)  
[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

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CHRISTOPHER D. RICH  
Clerk of the District Court

Signed: 7/5/2018 11:04 AM  
By: Janet Ellis  
Deputy Court Clerk



**ORDER DENYING MOTION TO AMEND THE COMPLAINT - 2**

000251

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-8744

**ORDER AWARDING COSTS**

Plaintiff filed a complaint alleging a breach of a fiduciary duty by her former attorney in the course of his representation of her in divorce proceedings. The Court granted Defendant's motion to dismiss her complaint for failure to state a claim upon which relief may be granted. Defendant then submitted a memorandum of costs seeking an award of mandatory costs, discretionary costs, and attorney fee costs. Plaintiff filed a timely motion to disallow those costs. For the reasons stated below, the Court awards the Defendant costs as a matter of right, but not the requested discretionary costs and not attorney fees.

As the prevailing party, Defendant is entitled to an award for certain costs.

Idaho Rule of Civil Procedure 54(d) states that the prevailing party in an action is entitled to an award for certain of its costs. Those costs are listed in Rule 54(d)(1)(C). In this case the only request for a cost listed in that subsection is for the filing fee. The Court will award that cost. Defendant is the prevailing party in this action; he was successful in getting the only cause of action in this matter dismissed. He is entitled to that cost as a matter of right. The motion to disallow that cost is denied.

**ORDER AWARDING COSTS - 1**



Idaho Rule of Civil Procedure 54(d)(1)(D) authorizes a trial court to award to the prevailing party additional costs “on a showing that the costs were necessary and exceptional costs, reasonably incurred, and should in the interest of justice be assessed against the adverse party.” Defendant asks for an award to compensate him for making photocopies of various documents in preparation for discovery proceedings in this case. Whether to award such costs is left to the discretion of the trial court. While expenses incurred in copying documents are necessary expenses in most court actions, they are certainly not exceptional costs in every case. There are cases, such as those cited to by the Defendant, where copying costs can be exceptional. This is not one of those cases. The Court declines to award the discretionary costs requested. The motion to disallow those costs is granted.

Idaho Rule of Civil Procedure 54(e) authorizes a trial court to award to the prevailing party the reasonable costs incurred by the party to hire his attorney. However, the court may award attorney fees only when provided for by statute or by contract. I.R.C.P. 54(e)(1). Defendant argues attorney fees are appropriate in this case under I.C. § 12-121. That statute simply grants the judge in any civil action the ability to award reasonable attorney fees to the prevailing party. However, I.R.C.P. 54(e)(2) limits the judge’s ability to award fees pursuant to that statute. That section of Rule 54 clarifies the judge may only award fees pursuant to I.C. § 12-121 when the judge finds the case was brought, pursued, or defended frivolously, unreasonably, or without foundation.

Defendant argues such was the case here. Defendant argues that prior decisions of the Idaho Supreme Court have made it clear that when a client sues her lawyer alleging her lawyer breached some duty owed to her that arose from their professional attorney-client relationship, the only cause of action the client may bring is one for professional negligence (i.e. malpractice). Defendant argues it is clear under Idaho law that in order to recover in professional negligence, a plaintiff must show damages as a result of the breach of the duty owed. Defendant argues that because Plaintiff never alleged damages as a result of the breach she claimed, Plaintiff should have known from the start that she could not bring this claim. Therefore, Defendant argues this claim was frivolous.

**ORDER AWARDING COSTS - 2**

As is hopefully evident from this Court's memorandum decision granting Defendant's motion, this Court does not find the issue to be that straightforward. This Court concludes Plaintiff's position was based on a good faith interpretation of the applicable Idaho Supreme Court precedent. Therefore, the Court declines to award Defendant attorney fees under I.C. § 12-121. Defendant has not cited any other statute that would entitle him to an award of attorney fees. Therefore, the motion to disallow attorney fees is granted.

Defendant is awarded costs in the amount of \$140.08. The Court will amend the judgment in this action to reflect that award. The motion to disallow costs is, in all other respects, granted.

IT IS SO ORDERED.

Signed: 7/3/2018 02:43 PM

  
\_\_\_\_\_  
JONATHAN MEDEMA  
District Judge

CERTIFICATE OF MAILING

I hereby certify that on July 5, 2018, I served a true and correct copy of the within instrument as follows:

Kim J. Trout  
TROUT LAW, PLLC  
ktrout@trout-law.com

☐ U.S. Mail, Postage Prepaid  
☐ Interdepartmental Mail  
☒ Electronic Mail  
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☐ U.S. Mail, Postage Prepaid  
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CHRISTOPHER D. RICH  
Clerk of the District Court

Signed: 7/5/2018 11:06 AM  
By: Janet Ellis  
Deputy Court Clerk



**ORDER AWARDING COSTS - 4**

000255

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-8744

**AMENDED<sup>1</sup> JUDGMENT**

JUDGMENT IS ENTERED AS FOLLOWS:

All of Plaintiff's claims against Defendant are dismissed with prejudice. Judgment is entered against Plaintiff, in favor of Defendant, for costs in the amount of \$140.08.

Signed: 7/3/2018 02:43 PM

  
\_\_\_\_\_  
JONATHAN MEDEMA  
District Judge

<sup>1</sup> This Judgment is being amended to reflect the Court's award of costs to Defendant.

CERTIFICATE OF MAILING

I hereby certify that on July 5, 2018, I served a true and correct copy of the within instrument as follows:

Kim J. Trout  
TROUT LAW, PLLC  
ktrout@trout-law.com

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CHRISTOPHER D. RICH  
Clerk of the District Court

Signed: 7/5/2018 11:09 AM

By: Janet Ellen  
Deputy Court Clerk



AMENDED JUDGMENT - 2

000257

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ktrout@trout-law.com

Attorney for the Plaintiff/Appellant.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff/Appellant,

vs.

JAMES E. BEVIS,

Defendant/Respondent.

Case No. CV01-17-08744

**NOTICE OF APPEAL**

I.A.R. 17

TO: THE ABOVE-NAMED DEFENDANT, JAMES E. BEVIS, AND HIS ATTORNEYS,  
AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant Rebecca Parkinson appeals against the above-named respondents from the Judgment entered on March 23, 2018. A copy of the judgment is attached to this notice.
2. Appellant has a right to appeal to the Idaho Supreme Court under I.A.R. 11(a)(1), as the judgment described in paragraph one of this notice is an appealable judgment.
3. Appellant makes the following preliminary statement of the issues on appeal; provided, this list of issues on appeal shall not prevent appellant from asserting other issues on appeal.
  - a. Did the District Court err in holding that Appellant's breach of fiduciary duty claim was, in essence, a professional negligence claim?
  - b. Did the District Court err by dismissing Appellant's case?

c. Did the District Court err by dismissing Appellant's case without first allowing Appellant to further amend its complaint?

d. Did the District Court err by denying Appellant's motion for reconsideration?

e. Did the District Court commit other errors of fact and law?

f. In accordance with I.A.R. 17(f) this is a preliminary statement of the issues on appeal, the Appellant hereby reserves the right to assert additional issues on appeal.

4. There has been no order entered sealing all or any portion of the record.

5. Appellant requests the standard reporter's transcripts as defined by I.A.R. 25, supplemented by the reporter's transcripts of the following hearings and proceedings:

a. Appellant requests that a transcript of the hearing held on February 6, 2018 before the Honorable Jonathan Medema be made part of the record on this appeal. The appellant requests an electronic transcript.

b. Appellant requests that a transcript of the hearing held on June 4, 2018 before the Honorable Jonathan Medema be made part of the record on this appeal. The appellant requests an electronic transcript.

6. The appellant requests the following documents to be included in the clerk's record, in addition to those included under I.A.R. 28: An electronic copy of the entire District Court file.

7. I make the following certifications:

a. That I have served a copy of this notice of appeal on each reporter of whom a transcript has been requested as named below at the address set out below:

Penny Tardiff  
Ada County Courthouse  
200 W. Front St.  
Boise, Idaho 83701

b. That I have paid the estimated fee for preparation of the reporter's transcripts;

c. That I have paid the estimated fee for preparation of the clerk's record;

d. That I have paid the applicable appellate filing fees;

e. That I have effected service upon all parties required to be served pursuant to I.A.R.  
20.

Dated August 15, 2018.

TROUT LAW, PLLC

/s/ Kim J. Trout  
Kim J. Trout  
Attorney for Plaintiff/Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 15, 2018, a true and correct copy of the above and foregoing document was served as indicated below:

Keely E. Duke  
[ked@dukescanlan.com](mailto:ked@dukescanlan.com)

iCourt



Aubrey D. Lyon  
[adl@dukescanlan.com](mailto:adl@dukescanlan.com)

/s/ Kim J. Trout  
Kim J. Trout



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff,

vs.

JAMES E. BEVIS,

Defendant.

Case No. CV01-17-8744

**JUDGMENT**

JUDGMENT IS ENTERED AS FOLLOWS:

All of Plaintiff's claims against Defendant are dismissed with prejudice.

Signed: 3/23/2018 12:47 PM

  
\_\_\_\_\_  
JONATHAN MEDEMA  
District Judge

## CERTIFICATE OF SERVICE

I, Christopher D. Rich, the undersigned authority, do hereby certify that I have emailed/mailed on March 23 , 2018, one copy of the ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause as follows:

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CHRISTOPHER D. RICH  
Clerk of the District Court

Signed: 3/23/2018 01:59 PM

By: Janet Ellis  
Deputy Court Clerk



1 TO: CLERK OF THE COURT, IDAHO SUPREME COURT  
2 451 WEST STATE STREET, BOISE, IDAHO  
3 FAX (208) 334-2616

4 REBECCA PARKINSON, ) Docket No. 46269-2018  
5 )  
6 Plaintiff-Appellant, ) Case No. CV01-17-8744  
7 )  
8 vs. ) NOTICE OF LODGING  
9 )  
10 JAMES E. BEVIS, )  
11 )  
12 Defendant-Respondent. )  
13 \_\_\_\_\_ )

NO. \_\_\_\_\_  
A.M. 9:32 FILED P.M. \_\_\_\_\_  
OCT 05 2018  
CHRISTOPHER D. RICH, Clerk  
By KELLE WEGENER  
DEPUTY

14 NOTICE OF TRANSCRIPT(S) LODGED

15 Notice is hereby given that on September 17, 2018,  
16 I lodged one (1) transcript, totaling 32 pages, for  
17 the following dates/proceedings:

18 **02-06-18 Motion to Dismiss**

19 for the above-referenced appeal with the District Court  
20 Clerk for Ada County, in the Fourth Judicial District.

21 *SMHeronemus*  
22 Susan M. Heronemus,  
23 RPR, CSR No. 728  
24  
25

IN THE SUPREME COURT OF  
THE STATE OF IDAHO

NO. \_\_\_\_\_ FILED  
A.M. 9:32 P.M. \_\_\_\_\_  
OCT 05 2018

CHRISTOPHER D. RICH, Clerk  
By KELLE WEGENER  
DEPUTY

REBECCA PARKINSON ,  
Plaintiff /Appellant ,  
vs .  
JAMES E. BEVIS ,  
Defendant /Respondent .

} Supreme Court Docket  
46269

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on October 3, 2018 , I  
lodged a transcript 25 pages in length for the  
above -referenced appeal with the District Court  
Clerk of Ada County in the Fourth Judicial District .

**Penny L. Tardiff** Digitally signed by Penny L.  
Tardiff  
Date: 2018.10.03 12:49:13 -06'00'

-----  
(Signature of Reporter )

-----  
Penny L. Tardiff CSR -----

-----  
10 -3 -2018 -----

Hearing Date : June 4, 2018

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff-Appellant,

vs.

JAMES BEVIS,

Defendant-Respondent.

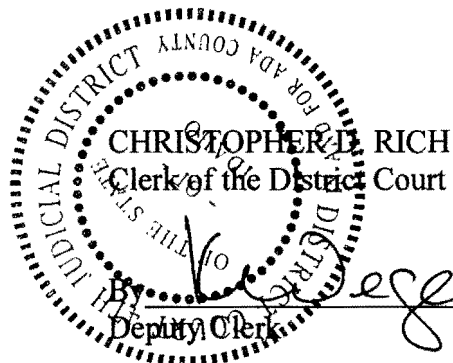
Supreme Court Case No. 46269

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 5th day of October, 2018.



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff-Appellant,

vs.

JAMES BEVIS,

Defendant-Respondent.

Supreme Court Case No. 46269

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

KIM J. TROUT

ATTORNEY FOR APPELLANT

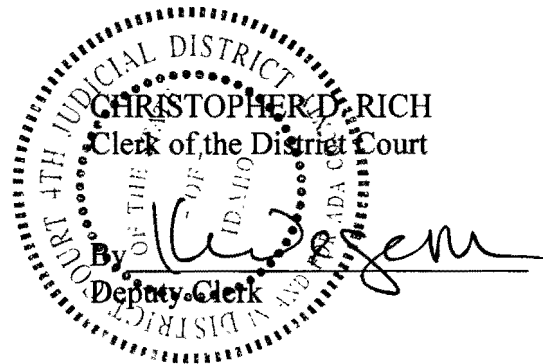
BOISE, IDAHO

KEELY E. DUKE

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Date of Service: OCT 05 2018



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REBECCA PARKINSON,

Plaintiff-Appellant,

vs.

JAMES BEVIS,

Defendant-Respondent.

Supreme Court Case No. 46269

CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 15th day of August, 2018.

